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AUSTRALIA

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"We told them every word in our dictionaries for 'refugee'..."

-- An Iraqi father, describing what he told Australian authorities when his boat was refused entry in October 2001.

An Afghan refugee holds her baby, born on a boat smuggling refugees to Australia. The boat was intercepted and forcibly returned to Indonesia by the Australian navy in October 2001, without allowing those on board a chance to seek asylum in Australia. (c) 2001 Agence France Presse

"BY INVITATION ONLY:" AUSTRALIAN ASYLUM POLICY

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**“BY INVITATION ONLY”
AUSTRALIAN ASYLUM POLICY**

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I. SUMMARY

On August 27, 2001, Australia gained international attention when it refused to allow a Norwegian freighter to deliver 433 asylum seekers rescued at sea, most of them originally from Afghanistan, to Christmas Island, Australia, the closest place of safety. In September 2001 Australia enacted legislation with the explicit objective of stemming the unauthorized arrival of refugees from the Middle East and South Asia. The Australian government believes these refugees could and should have found protection closer to home. More broadly, its treatment of the relatively few refugees who have attempted to reach Australia since August 2001 is intended to serve as a powerful deterrent to others not to consider seeking asylum in Australia.

This report examines Australian refugee policy since Australia closed its coastal borders to asylum seekers in August 2001.

In research conducted during April and May 2002, Human Rights Watch interviewed dozens of refugees in Australia and in Indonesia about their reasons for leaving the countries they first reached after leaving their homes and for putting themselves at the mercy of people-smugglers to make the dangerous journey to Australia. Based on their accounts, Human Rights Watch disputes the Australian government's assumption that these individuals were generally able to enjoy effective protection in the countries where they first sought asylum, such as Iran and Pakistan, or that they were able to obtain effective protection in countries they passed through en route, like Indonesia and Malaysia.

Among the compelling reasons cited by refugees for leaving their own regions were serious risks of forced return to countries where their lives and freedom were endangered (*refoulement*); continuing threats from their original persecutors operating across borders; inability to acquire legal status, without which they ran the risk of harassment, arrest and detention; and discriminatory restrictions on their access to the labor market, housing, health care and education, which often threatened their daily subsistence. In some cases, protection closer to home, though initially adequate, broke down over time, forcing refugees to travel on in search of greater security.

Nor could these refugees enjoy effective protection in the countries they passed through en route to Australia, such as Malaysia and Indonesia. During the period in question, neither Southeast Asian state authorities nor the UN High Commissioner for Refugees (UNHCR) protected asylum seekers from the real risk of detention as illegal migrants under inhumane conditions. Even if UNHCR recognized their status, these refugees did not have a realistic prospect of local integration or resettlement from Indonesia to another country.

Human Rights Watch also found that, even refugees who were aware of the resettlement system that allows certain refugees to move legally to safer countries such as Australia had good reasons, including fear of approaching UNHCR offices watched by agents of their persecutors, for failing to apply. Others did apply for resettlement, but faced lengthy delays during which they remained at grave risk.

Under these circumstances, Australian policies intended to deter refugees from coming to Australia and instead contain them within their regions of origin or allowing them to come to Australia "by invitation only" are a partial abdication of its responsibilities under the Refugee Convention.

The second half of the report analyzes, according to international human rights standards, five deterrent measures introduced by the Australian government:

- The interception of boats containing asylum seekers;
- The forcible return of asylum seekers to Indonesia, without guarantees for their protection;

- The forcible transfer of asylum seekers to the Pacific island nations of Nauru and Papua New Guinea, where they are detained;
- A regime of mandatory detention on the Australian mainland and now on Christmas Island, an Australian territory in the Indian Ocean deemed to be outside the Australian “migration zone”; and
- The design of an elaborate Temporary Protection Visa regime, which affords limited rights to refugees.

All of these measures violate international human rights standards. The main human rights obligations that have been violated are freedom from inhuman and degrading treatment, freedom from arbitrary detention, the right to due process, and a refugee’s right to travel documents. Australia has also disregarded the fundamental human rights principle of family unity.

When Australia forcibly returned asylum seekers to Indonesia without sufficient guarantees for their protection in October 2001, the government breached several of its obligations under both international human rights law and international maritime law. By subjecting asylum seekers to arbitrary detention on Pacific island states—Nauru and Papua New Guinea—and processing asylum claims there without sufficient guarantees of due process, such as access to independent legal advice, Australia further violated their rights. Moreover, by contracting for the management of the detention centers with the International Organization for Migration (IOM), an organization with no mandate to protect refugees, Australia has attempted to evade its own responsibilities as a state party to human rights treaties.

Australia’s long-standing policy of mandatory detention applies to all asylum seekers entering the country without authorization. This blanket policy of indefinite and non-reviewable detention has been found to be “arbitrary” and therefore a violation of international human rights law. The government justifies this policy to the Australian public in part by pointing to the fact that majority of those detained have not come directly from their countries of origin, as if this necessarily makes them less than genuine refugees. Human Rights Watch findings suggest to the contrary that many of those labeled as “queue-jumpers” by the Australian government are in urgent need of protection and so should be treated no differently than other refugees.

Lastly, Australia’s Temporary Protection Visa regime violates several core rights of recognized refugees, denying many of them any prospect of family reunification and condemning them to live in perpetual limbo.

Australia’s punitive use of such measures to deter “secondary movement” of refugees beyond their own regions of origin sets a new and dangerous precedent which must not be followed by other states. A traditional leader in the refugee field (in 2001, Australia ranked third in the world in terms of numbers of refugees invited to resettle from overseas), Australia is now undermining the foundations of the international protection regime.

Methodology

This report is based on a Human Rights Watch mission to Australia and Indonesia in April and May 2002 and subsequent research, including correspondence with refugees in New Zealand and Nauru, as well as meetings with the Australian government, IOM Jakarta, and UNHCR in Canberra and Geneva. In Indonesia, interviews were conducted with refugees in Jakarta, Lombok, and the town of Cisawa. In Australia, they were conducted in Melbourne and Sydney, including inside Villawood Detention Centre. Human Rights Watch sought but was not granted permission to interview refugees detained at Australia’s expense on Manus Island, Papua New Guinea. A total of fifty interviews were conducted with refugees of varying ages, genders, and nationalities, each in privacy and each lasting from one to three hours. The names of all refugees and agency staff have been changed or withheld to protect their privacy, security or

positions. In the footnotes to this report, interviews with refugees and asylum seekers are numbered 1-50 with reference to the full interview notes held on file with Human Rights Watch.

II. CONCLUSIONS AND RECOMMENDATIONS

To the Government of Australia

- Cease pushing back intercepted asylum seekers. All persons who enter Australia's territorial waters should have the opportunity to apply for asylum under Australian law. Australia should stop trying to push asylum seekers back to Indonesia or other states in the region where effective protection cannot be ensured.
- Do not mistreat people on board unauthorized vessels that are intercepted or rescued. Australia should ensure that the treatment of those on board fully complies with its international human rights and refugee protection obligations, as well as international maritime law. Special attention should be given to the needs of women and children. Any officials using unnecessary force or otherwise subjecting those on board to any form of cruel, inhuman, or degrading treatment should be disciplined or prosecuted as appropriate. The conduct of past interception operations should become the subject of further independent investigation, so that perpetrators of human rights abuses can be held to account.
- Cease arbitrary detention of refugees and rejected asylum seekers in Nauru and Papua New Guinea.
- Recognize special responsibility toward refugees in the Pacific states and in Indonesia, and offer resettlement places and family reunification accordingly. Australia should provide secure legal status that affords those resettled from these countries all the rights to which they are entitled under the Refugee Convention. Australia should offer special humanitarian visas to rejected asylum seekers who cannot be returned to their countries of origin until their return is possible.
- Abandon the policies of territorial "excision" and detention on excised territories. All asylum seekers present on any part of Australian territory should be able to file a claim for asylum and have full access to legal assistance and community support. Family members should not be kept apart while these claims are processed.
- End detention under arbitrary and inhumane conditions. Australia should follow UNHCR guidance, which states that asylum seekers should not be detained, except in exceptional circumstances. Detention should not be used to deter secondary or unauthorized movements of refugees to Australia. All asylum seekers, including those held on Christmas Island or other offshore or excised sites, should have access to independent legal counsel.
- Allow international and other impartial monitoring of detention centers. If the government persists in detaining asylum seekers on excised territories such as Christmas Island, it should, for example, invite the U.N. Working Group on Arbitrary Detention to investigate detention conditions there. Asylum seekers in such centers should have access to an independent review or appeal mechanism, both for their asylum decisions and for challenges to their detention.
- Dismantle the hierarchy of refugee protection visas, in which temporary protection is used punitively. As Australia's Temporary Protection Visas expire, recognized refugees should not be required to repeat the status determination process. Every refugee should be provided with an effective opportunity to rebut the presumption that another country previously afforded him or her effective protection.
- Use temporary protection only as an instrument of *prima facie* recognition in mass influx situations. In accordance with international practice, all temporary protection for refugees must be limited in duration, and be consistent with the rights afforded under the Refugee Convention. Refugees must not be indefinitely denied the right to integrate into new societies if they are unable to return to their country of origin. The government must take all appropriate measures to assist refugee children be reunited with their families.

- Ensure that financial or technical assistance to other countries for the purpose of strengthening border control and combating people-smuggling includes assistance and training in refugee law and refugee protection. Australia should more vigorously pursue policies that support first countries of asylum and that are directed toward resolving the root causes of displacement around the world.
- Do not force refugees to return home and refrain from actively promoting the return of refugees or asylum seekers unless and until there are fundamental, durable and effective changes of circumstances in countries of origin, as acknowledged by UNHCR and other international bodies, and until the infrastructure and security conditions are put in place to receive them. Rejected asylum seekers should be granted special, interim humanitarian visas until their return under conditions of safety and dignity becomes possible.

To the International Organization for Migration (IOM)

- Cease managing detention centers, such as those on Nauru and on Manus Island, Papua New Guinea, where detention is arbitrary and contrary to international standards for the treatment of asylum seekers.
- Continue to elaborate joint principles, with UNHCR, for demarking UNHCR's and IOM's respective areas of work so that IOM operations do not impinge upon UNHCR's protection mandate. IOM should refrain from having a management or supervisory role in situations where substantial numbers of asylum seekers have not obtained effective protection. IOM should defer to UNHCR guidance in identifying such situations and in deciding whether or not to undertake any proposed operation involving "mixed flows" of refugees and migrants.
- Establish transparent standards and guidelines for field offices, grounded in human rights law, on reception and assistance of asylum seekers and refugees. These guidelines should cover the level of material assistance; access to legal advice, access to family tracing services; meeting the needs and respecting the rights of women, children and other vulnerable groups, including torture survivors; and advocacy for the release of asylum seekers detained as illegal migrants in transit countries.
- Diversify funding for each program among a range of its member states, avoiding situations where a single state or group of states funds a program in which they have a vested interest in the program's deterrence of refugee movements. Interception and interdiction operations are frequently of this character, often interfering with the fundamental right to seek asylum.
- Take immediate steps to examine and improve communications with asylum seekers, refugees awaiting resettlement, and rejected asylum seekers in Indonesia and the Pacific sites. IOM communication policies should include greater emphasis on the participation and empowerment of such persons in all decisions affecting their lives.
- Ensure the right of education for all children, regardless of immigration status, in all of the centers IOM manages.
- Establish effective and confidential complaint mechanisms to ensure that people being assisted can communicate complaints or report unreasonable staff behavior, without fear of reprisal or discrimination.

To the UN High Commissioner for Refugees (UNHCR)

- Ensure that policies on secondary movements, including those of urban refugees within regions of origin, are consistent with the principle that no refugee should be penalized without a fair opportunity to explain why they moved.
- Educate the public on the compelling human rights reasons for secondary movements by refugees. UNHCR and its member states should ensure the right of refugees to seek effective protection, not only from their persecutors, but also from unnecessarily severe or unduly prolonged restrictions on their fundamental human rights.

- Issue more explicit and prominent public statements that UNHCR's presence in a particular country and/or its work under its mandate should never be taken as a sufficient measure of effective protection. UNHCR should demand a retraction whenever Australia or any other government bases domestic policy upon this false premise.
- Work with IOM to bring greater clarity to the organizations' respective roles. UNHCR should act as an official adviser to IOM on decisions to undertake operations that in any way affect the right to seek asylum, and its advice should be followed as a general rule.
- Significantly improve communications with refugees and asylum seekers in Indonesia, based on the need for greater consultation with and trust of those whom UNHCR is mandated to protect. UNHCR needs to better explain reasons for delays in resettlement selection and processing to refugees.
- Provide all asylum seekers undergoing status determination with written information in their own language on: i) the legal standards to be applied; ii) a realistic indicative timetable for each stage of the determination process; and iii) when applicable, detailed reasons for rejection. For purposes of accountability, both the asylum seeker and the officer conducting the interview should sign this written information indicating that it was transmitted and received.
- Explore strategies for having independent legal advisers, trained in refugee law, assist those undergoing refugee status determinations in Indonesia. In the absence of such independent advice, UNHCR Jakarta should make greater efforts to ensure that all asylum seekers are fully aware of the criteria and information on which decisions are based and the grounds for any rejection of their asylum claim.
- Provide for independent appeal of refugee status determinations – outside the office in which the first decision is taken. Member states should significantly increase the resources provided to UNHCR for its refugee status determination procedures in order to ensure that they can be conducted with greater fairness and consistency.
- Develop future strategies to address secondary movements to and within the Asia-Pacific region that focus on the human rights and refugee protection-related causes of such movements.

To the Governments of Nauru and Papua New Guinea

- Terminate agreements made with Australia, which form the basis for the "Pacific Solution" and thereby end the arbitrary detention of asylum seekers, refugees and rejected asylum seekers on their territories, as well as collaboration with Australia's policy of coerced transfer of such persons across borders.
- As a short-term measure, facilitate international and other impartial monitoring of detention centers. The U.N. Working Group on Arbitrary Detention, for example, should be invited to investigate conditions of detention in such locations. Detainees should have access to an independent review or appeal mechanism challenging the necessity of their detention.

To the International Community

- States and intergovernmental organization should affirm that, given the current failings of refugee protection in many countries of first asylum, large numbers of refugees have a legitimate need to move beyond their own regions in search of effective protection.
- States and intergovernmental organizations should acknowledge more frequently that a country may continue to generate persons fleeing persecution despite the end of an armed conflict or a change in government (as in Afghanistan), and that often refugees continue to fear persecution at home despite such changed circumstances.
- Other asylum states should protest Australia's unilateral deterrence policy in bilateral and multilateral for a such as the Commission on Human Rights and the UNHCR Executive

Committee, both as human rights violations and as partial abdication of its responsibility to protect refugees.

- Other asylum states should reject Australia's ongoing attempts to export its policies, which have resulted in human rights violations, and its attempts to justify such deterrence by overly restrictive interpretations of international refugee law.
- U.N. treaty bodies and special procedures should examine human rights violations that arise in or as a consequence of Australian policy and make appropriate recommendations.
- The High Commissioner for Human Rights should consult with the High Commissioner for Refugees on human rights implications of Australian asylum policy and develop a joint high-level intervention.
- Other asylum states should urge the Australian government to accept or facilitate international monitoring of detention facilities in Australia, Nauru, and Papua New Guinea to ensure that conditions within such facilities at least conform to relevant UN standards.
- Should punitive measures or returns to countries of first asylum be imposed on those who have made secondary movements, then governments should accord every individual the right to rebut the presumption – in a procedure that provides all due process protections – that he or she was previously able to seek and enjoy effective protection in another country.
- Governments that contract with IOM or any other independent agency should recognize that they remain bound by their obligations under international human right law.

III. OVERVIEW: REFUGEES' PATH OF FLIGHT TO AUSTRALIA

In the year 2000-01, 4,141 asylum seekers arrived by boat in Australia.¹ Nearly all of them were from Iraq, Iran and Afghanistan. Ongoing and severe human rights abuses in each of these countries prompted people to make the difficult decision to leave their homes. This section traces in general terms why they flee and the obstacles they encounter — including policies introduced by the government of Australia to block their movement. Subsequent sections detail each stage of the refugees' flight towards Australia, and the abuses they suffer.

Flight from persecution at home

Iraq: Displacement from Iraq is primarily the result of the Iraqi government's gross abuse of human rights throughout the past decade.² Uprisings after the Gulf War led to attacks on civilians and rebels in the Shi'a Muslim south and Kurdish north during 1991, which in turn propelled more than a million people to flee, including 350,000 into Iran. Saddam Hussein's regime has persecuted political opponents and ethnic minorities with extreme measures including forced relocation, arbitrary arrest and detention, torture, disappearance, summary execution, use of chemical weapons and the destruction of entire villages. Penalties for even minor criminal offences often violate international human rights standards. Iraqi refugees and asylum seekers interviewed by Human Rights Watch for this report included medical professionals who refused to perform amputations of ears as a criminal sentence, rebels arrested by Iraqi security forces for providing aid to starving people in southern Iraq, Kurdish families forced from their villages, and people of imputed political opinion, who faced arrest and torture when named by other torture victims during interrogations.³

¹ Australian Department of Immigration (DIMIA) statistics – see DIMIA Factsheet 73.

² See Human Rights Watch reports, including: Human Rights Watch/MENA, "Iraq's Brutal Decrees: Amputation, Branding and the Death Penalty," *A Human Rights Watch Report*, vol. 7 no.3, June 1995; *Bureaucracy of Repression: The Iraqi Government in Its Own Words*, (New York: Human Rights Watch, February 1994); "Endless Torment: The March 1991 Uprising in Iraq and its Aftermath," June 1992.

³ See, e.g., Human Rights Watch interviews, Nos. 1, 2, 3, 8, 28 and 29 (On file at Human Rights Watch). See also: Human Rights Watch, *World Report*, (New York: Human Rights Watch, 2001) and Human Rights Watch, *World Report*, (New York: Human Rights Watch, 2002).

Afghanistan: Refugees fleeing from Afghanistan have also endured cycles of violence and persecution for decades.⁴ After the Soviet Union withdrew its occupation forces in 1989, local warlords, Mujahidin⁵ troops and government forces vied for control of several regions, creating widespread civil conflict. The Taliban regime, which rose to power in 1995, indiscriminately killed and tortured civilians to maintain control of certain areas, targeted specific ethnic and religious groups, and conducted a full-scale assault on the fundamental rights and freedoms of women.⁶ Forced conscription of young men and boys prompted many, especially eldest sons, to join the ranks of refugees fleeing from Afghanistan. Mustafa, for example, is an unaccompanied Hazara boy now living in Sydney.⁷ He remembers the events leading up to his departure from Afghanistan, aged thirteen, in late September 2000:

My father was a landlord who got involved with the political party Hezb-i Wahdat. The Taliban abducted my older brother and they made threats about killing my other brothers and sister if my father did not submit weapons which they believed he was hiding. As he did not have any weapons, he offered money instead, but they did not accept this and dumped my brother's murdered body at the front door of our house. My father and I were in hiding in the mountains on this day, but we heard what had happened and returned to our village to bury the body. A few days later the Taliban repeated their demands and my father said to me: "I have to save you. I have to send you to Pakistan"... It was a friend of my father's who advised that I would not be safe from the Taliban in either Iran or Pakistan and suggested that I be sent to Australia.⁸

Iran: Refugees of varying religious persuasions, Christians, Jews, Zoroastrians, Bahais, Sabian Mandaeans, and Sunni Muslims have all suffered discrimination and persecution, and conversion from Islam is not tolerated.⁹ Many Iranian refugees, particularly those on the side of political reform, have been subjected to political violence including assassination, arbitrary arrest, unfair trial, and restrictions on freedoms of expression, association and assembly. The Iranian refugees interviewed by Human Rights

⁴ See Human Rights Watch reports, including: Human Rights Watch, "Humanity Denied: Systematic Violations of Women's Rights in Afghanistan," *A Human Rights Watch Report*, vol. 13, no. 5 (C), October 2001; Asia Watch, "Towards a Political Settlement in Afghanistan: The Need to Protect Human Rights," *A Human Rights Watch Report*, vol. 18 no.3 (C), August 2001; *The Forgotten War: Human Rights Abuses and Violations of the Laws of War Since the Soviet Withdrawal*, (New York: Human Rights Watch, February 1991).

⁵ The "Mujahidin" is an umbrella term used to describe a number of different groups, mainly composed of ex-Afghan army troops and rural militias who took up arms against the Soviet Union in the 1980s and many of whom continued to fight against the Taliban in the 1990s.

⁶ The UNHCR "risk profile" for persons fleeing Afghanistan in the period dealt with in this report, included: those affiliated with the former communist regime; people promoting secular government in Afghanistan; persons of a certain professional profile; ethnic and religious minorities; and women of a specific profile – in other words, those failing to conform with Taliban law. See UNHCR Caswaname Legal Unit, "Afghanistan – Profiles of Groups at risk," April 2001.

⁷ Of the Afghans arriving in Australia in 2001, the majority were ethnic Hazara. The Hazara are a Shi'a Muslim minority long persecuted in Afghanistan, both by the Taliban and previously by some of those who formed the Northern Alliance and who now hold power.

⁸ Human Rights Watch interview, No. 41, Sydney, April 21, 2002. See also Human Rights Watch, "Massacres of Hazara in Afghanistan," *A Human Rights Watch Report*, vol. 13, no. 1 (c), February 2001.

⁹ See Human Rights Watch reports, including Human Rights Watch, "Stifling Dissent: 'The Human Rights Consequences of Inter-Factional Struggle in Iran,'" *A Human Rights Watch Report*, vol. 13 no. 3 (E), May 2001; Human Rights Watch, "Religious and Ethnic Minorities Discrimination in Law and Practice," *A Human Rights Watch Report*, vol. 9 no. 7 (E), September 1997; Human Rights Watch, "Leaving Human Rights Behind," *A Human Rights Watch Report*, vol. 9 no. 2 (E), May 1997; Human Rights Watch/Asia, "Power Versus Choice: Human Rights and Parliamentary Elections in the Islamic Republic of Iran," *A Human Rights Watch Report*, vol. 8 no.1 (E), March 1996; *Guardians of Thought: Limits on Freedom of Expression in Iran*, (New York: Human Rights Watch, August 1993).

Watch for this report feared religious persecution (though they asked for their religious groups not to be named, for fear of reprisals). A few fled Iran in fear of political persecution.¹⁰

No sanctuary in their regions of origin

Refugees from these countries of origin first flee to bordering countries – for example, Iraqis often flee to Iran and Afghans often flee to Pakistan. Life as a refugee in the first countries they reach (often called “countries of first asylum”) is grueling, however, most fundamentally because refugees in countries like Iran and Pakistan are not accorded a legal status that allows them to reestablish their lives without fear of harassment by the police or other authorities. Some may be returned to their home countries where they fear persecution. That violates an accepted principle of customary international law never to return refugees to countries where their life or freedom would be in jeopardy because of a well-founded fear of persecution.¹¹ This norm of *non-refoulement* is set forth in Article 33 of the 1951 Convention Relating to the Status of Refugees (the Refugee Convention)¹² and is the cornerstone of refugee protection.

Because their personal security is at risk, these refugees should be prime candidates to apply through the offices of the United Nations High Commissioner for Refugees (UNHCR) for resettlement in a third country.

Resettlement is one of three “durable solutions” for refugees. The other two are local integration and voluntary repatriation. Resettlement involves transferring certain groups or individuals to third countries when the quality of protection proves insufficient for them in first countries of asylum. As such it is an invaluable system that operates to save thousands of lives every year. Countries accepting resettled refugees are usually in the industrialized world, like Australia.¹³ Refugees fulfilling one of eight criteria may be referred for resettlement: refugees with legal and physical protection needs; survivors of violence and torture; refugees with certain medical needs; women at risk; refugees in need of family reunification; children and adolescents; elderly refugees; and refugees without prospects for local integration.¹⁴ The protracted, deteriorating situations for refugees in Iran, Jordan, Syria, or Pakistan, where access to any form of legal status has been removed from hundreds of thousands of refugees, mean that all these people at least qualify under at least the final resettlement criterion of lack of integration prospect.

However, the resettlement systems in Pakistan and Iran are not always accessible to refugees at risk, are fraught with delay, and only a tiny number of cases are actually referred. Refugees soon learn how unlikely an option it is. Less than 2 percent of the world’s refugees are resettled in any given year.¹⁵ Eventually refugees may find conditions in these countries intolerable and choose to move again, this time out of their “regions of origin.” A common first destination is Malaysia, where refugees from Islamic countries are given temporary permission to enter. From Malaysia, many refugees negotiate onward passage with people-smugglers, who often decide where to take them. A common intended destination is Australia, by way of Indonesia.

¹⁰ One refugee interviewed by Human Rights Watch, for example, was a medical laboratory worker who feared political persecution after stumbling across secret information about the death of Seyyed Ahmad Khomeini, the Ayatollah’s son, in 1996. Human Rights Watch interview, No. 45, Sydney, April 27, 2002.

¹¹ The norm of *non-refoulement* is customary international law. International customary law is defined as the general and consistent practice of states followed by them out of a sense of legal obligation.

¹² Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 150, as amended by Protocol Relating to the Status of Refugees, January 31, 1967, 606 UNTS 267. (Hereafter “the Refugee Convention.”)

¹³ The eighteen governments who accept varying size quotas of refugees for resettlement are: Argentina, Australia, Benin, Brazil, Burkina Faso, Canada, Chile, Denmark, Finland, Iceland, the Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, and the United States of America.

¹⁴ See UNHCR, “Resettlement Handbook,” July 2002, Chapter 4.

¹⁵ In 2001, a global total of 33,100 refugees were resettled under UNHCR auspices. UNHCR, “Resettlement Handbook,” July 2002, Annex 5: Resettlement Statistics.

“Secondary movement” in search of “effective protection”

“Secondary movement” is any migration by a refugee beyond the country in which she was first a refugee, irrespective of her legal status, and irrespective of the time she spent in the first country to which she fled. In this context, it is movement from the Middle East or South Asia to a country in Southeast Asia, and then movement from Southeast Asia toward Australia, in many cases, a third or fourth movement.

“Secondary movement” ought to be a neutral term, but governments increasingly use it as if it were synonymous with “irregular movement,” a term used by UNHCR to refer to those refugees who leave a country of first asylum, where they have obtained “effective protection,” for economic or other non-compelling reasons. UNHCR Executive Committee (Excom)¹⁶ Conclusion No. 58¹⁷ states that all such “irregular movements” are inherently undesirable.

There is no basis in international law for using the mere fact of secondary movement as a presumptive bar to the right to seek asylum. The onward movement of refugees from the country where they first fled often reflects a serious failure of international protection there. Therefore, for example, an Afghan refugee moving on from Iran in search of protection elsewhere should not be treated differently from an asylum seeker arriving directly from a country of origin.

Australia’s interpretation of “effective protection” poses a formidable challenge for refugees who are subject to it. Australia defines effective protection as existing in a country where “the person will not face a real chance of being persecuted in the third country or returned to a country where his or her life or freedom would be threatened for a Convention reason.”¹⁸ Australia holds that it is unnecessary for the country in question to be a party to the Refugee Convention or for it to provide access to a secure legal status to refugees.

The Australian government agrees that the legal “right to reside, enter and re-enter,” which most refugees previously staying in Iran or Pakistan, for example, do not have, may be one test of effective protection, but contends that “even informal temporary residence may afford a sufficient foundation for the application of the principle [of effective protection]” and that it is a question of “practical fact” more than “legal right.”¹⁹ In other words, for the Iraqi, Afghan, and Iranian refugees interviewed for this report who left their regions of origin and headed toward Australia, the Australian government argues that their tolerated presence in other countries constituted “effective protection,” regardless of whether they were accorded any legal status or other rights there.²⁰

¹⁶ The Executive Committee (“Excom”) is UNHCR’s governing body. Since 1975, Excom has passed a series of “Conclusions” at its annual meetings. The Conclusions are intended to guide states in their treatment of refugees and asylum seekers and in their interpretation of existing international refugee law. While the Conclusions are not legally binding, they do constitute a body of soft international refugee law and Excom member states, including Australia, are obliged to abide by them.

¹⁷ UNHCR Excom Conclusion No. 58 (XL) – 1989.

¹⁸ See definition of “effective protection” in DIMIA, “Principle of Non-Refoulement (Article 33): An Australian Perspective, A Contribution to the UNHCR Global Consultations,” December 2001, p.13.

¹⁹ Ibid.

²⁰ The Australian courts have been gradually lowering the threshold of what is considered effective protection in a previous country. In *MIMA v Thiyagarajah* (1997-8) 80 FCR 453, an Australian court held that an individual who had already been granted refugee status in France had obtained “effective protection.” This fairly high standard has been weakened to such an extent that, in *Patto v Minister for Immigration and Multicultural Affairs* (2000) FCA 1554, the court found that it was acceptable to return a person to a country that was not party to the Refugee Convention provided that it “can be expected, nevertheless, to afford the person claiming asylum effective protection against threats to his life or freedom for a Convention reason.” See Penelope Mathew, “Safe for Whom? The Safe Third Country Concept Finds a Home in Australia,” in Susan Kneessone ed., *The Refugee Convention at Fifty* (2002).

The Australian government has stated, “Only where it is direct flight of a refugee from a country of origin or a country of first asylum when protection has broken down is irregular migration [meaning secondary movement] acceptable.”²¹ But it has showed no sign that it considers the protection situations in Iran, Pakistan or any other Middle Eastern, South Asian or Southeast Asian country to have “broken down.”

Refugees who face ongoing persecution, the risk of *refoulement* or any other threat to their lives in their countries of first asylum are not “effectively protected,” and their secondary movements from countries where they face these risks should not in any way affect their claims to asylum.

Moreover, when Iraqi or Afghan refugees reach Pakistan or Iran, for example, they seldom have access to a legal status, and this leaves them open to numerous other human rights abuses. The absence of individual refugee status determination, through full and fair procedures, or the absence of *prima facie*²² recognition in the alternative, amounts to unpredictable and therefore ineffective protection. Moreover, any state that violates the basic civil and political rights of refugees, such as the rights to freedom from arbitrary deprivation of liberty or property, should not be classed as offering effective protection. Even during a temporary stay, protection from *refoulement* without the means to subsist is not true protection.²³

Effective protection does not remain static over time: *non-refoulement* may be sufficient protection on the first day that an Afghan woman reaches Iran, but no longer suffices after many years of continued presence there. Without the prospect of local integration – that is, without a framework in which a refugee can enjoy basic rights such as the right to work and education – a refugee’s international protection becomes ineffective over time.²⁴ Where a state permanently denies a refugee access to any form of legal status, it violates its Refugee Convention obligations,²⁵ even if it refrains from *refoulement*. For longstanding refugees, such a state cannot be said to offer effective protection. The basis for this position

²¹ DIMIA, “Irregular Migration – Implications, Practical Dilemmas and Responses for APC States.”

²² When refugees flee in large numbers to neighboring countries, particularly in less developed regions of the world, it is not usually possible to ascertain whether every person involved in the influx actually meets the criteria for refugee status. Low-income countries frequently do not have the logistical, administrative, or financial capacity to undertake individual status determinations. Instead, there is a general assumption that when conditions are objectively dangerous in a country of origin, refugees are recognized on a ‘*prima facie*’ basis, without the need for further proof, and are afforded protection accordingly. See, e.g. Excom Conclusion No. 22, Protection of Asylum-Seekers in Situations of Large-Scale Influx (XXXII) - 1981 (noting that persons who “owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of, or the whole of their country of origin or nationality are compelled to seek refuge outside that country” are asylum-seekers who must be “fully protected,” and “the fundamental principle of non-refoulement including non-rejection at the frontier—must be scrupulously observed.”).

²³ See United Kingdom Court of Appeal decision in *R.v. Secretary of State for Social Security, ex parte B and the Joint Council for the Welfare of Immigrants* (21 June 1996) 4 AER 385, which found that if an asylum seeker were “left destitute, starving and at risk of grave illness and even death because he could find no one to provide him with the bare necessities of life” then the U.K. government “would almost certainly put itself in breach of the European Convention on Human Rights and of the Geneva [Refugee] Convention...”

²⁴ Excom Conclusion No. 58 (XL) – 1989 refers not only to protection against *refoulement* in the country of first asylum, but also to whether the refugee was treated “in accordance with recognized basic human standards until a durable solution is found there.” The meaning of “recognized basic human standards” however is not defined, and there is no reference to a situation in which the prospect of legal integration is specifically prohibited by national law. At a minimum, these “recognized basic human standards” might refer only to threats to life, liberty and security of the person. An expansive interpretation, on the other hand, might include the rights to work, education, religious freedom, access to courts and freedom of movement.

²⁵ The applicability of certain rights in the Refugee Convention has been read according to a sliding scale, in which certain rights apply to all refugees by virtue of their “simple presence,” additional rights to those with “lawful presence,” and a further subset to those who are “staying lawfully.” See Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed. (Oxford, 1996), p.307ff.

is the guidance of UNHCR in a number of public statements and Executive Committee Conclusions,²⁶ which in turn are based upon a full reading of the Refugee Convention rather than one that focuses only on *non-refoulement* (Article 33). For example, UNHCR stated in 1994, “To survive in the country of asylum, the refugee...needs to have some means of subsistence, as well as shelter, health care and other basic necessities...Beyond what is required for immediate survival, refugees need respect for the other fundamental human rights to which all individuals are entitled without discrimination.”²⁷

Interception and expulsion by Australia

Engaging in “secondary movement” unwittingly transforms an Iranian, Afghan or Iraqi refugee into a less-than-legitimate refugee in the eyes of Australian immigration authorities. The first obstacle that the Australian government puts in the path of those who move beyond Malaysia or Indonesia and attempt to reach Australian shores by boat is interception. Today, an unauthorized asylum seekers on boats intercepted by the Australian authorities could be either summarily returned to Indonesia or, depending on the seaworthiness of the vessel, disembarked and transferred to the Pacific island states of Nauru or Papua New Guinea. But these two island nations are losing patience with Australia’s policy of detention on their territory, so Australia is more likely to place such asylum seekers in detention on its own territory of Christmas Island or simply return the boats to Indonesian waters.

Australia’s current policy²⁸ of intercepting asylum seekers began on August 27, 2001, when the government prevented the MV Tampa, a Norwegian freighter, from disembarking 433 asylum seekers rescued from a dangerously overloaded and damaged vessel. The Master of the Tampa wanted to bring the asylum seekers, many of whom needed urgent medical attention, to Christmas Island, Australia as the closest “place of safety.”²⁹ The ship was refused entry, and the rescuees were transferred onto the Australian ship, HMAS Manoora, to be expelled from Australian territorial waters.³⁰ On September 7, 2001, a further 200 asylum seekers, mostly Iraqis, were placed on the Manoora when the Aceng, a “suspected illegal entry vessel” (“SIEV”), was intercepted. While the Manoora was at sea, a *habeas corpus* petition challenging the detention of the asylum seekers failed.³¹

In late September 2001, the Australian parliament quickly passed seven bills³² relating to refugees including The Border Protection Act,³³ which validated the Tampa policies and enacted new powers of

²⁶ See e.g. UNHCR Excom Conclusion No.15, para k.

²⁷ UNHCR, “Note on International Protection,” September 7, 1994, at para 9.

²⁸ Prior to the Tampa incident, when unauthorized boat arrivals were intercepted, passengers were given a “screening interview” to determine whether they were asylum seekers. Those “screened out” — in other words, those considered not to be asylum seekers by Australian Department of Immigration (DIMIA) Compliance Officers — were sent to “separation detention” in Port Hedland, Curtin or Woomera detention centers on the Australian mainland. Those in separation detention were not provided with lawyers or informed of their rights, so the odds were stacked against their ever applying for asylum. Meanwhile, those “screened in,” after receiving basic medical checks and care, were sent to a detention center on mainland Australia for the full duration of the processing of their asylum application; the government provided them with a free legal adviser to assist with making the application. The last unauthorized boat arrivals to be handled in this way were a group of 359 people who arrived at Christmas Island on August 22, 2001.

²⁹ See International Convention on Maritime Search and Rescue (Hamburg, April 27, 1979), of which Australia is a signatory: definition of “rescue” contained in its 1998 amendments (London, May 18, 1998).

³⁰ See Dr Michael White, QC, Executive Director, Centre for Maritime Law, “M.V.Tampa and Christmas Island Incident,” *BIMCO Review*, London, October 2001.

³¹ *Victorian Council for Civil Liberties Inc. v the Minister for Immigration and Multicultural Affairs & Others*, No. V899 of 2001. *Vadarlis v. Minister & Others* No. V900 of 2001.

³² Migration Amendment (Excision from Migration Zone) Act No.127 2001; Migration Amendment (Excision from Migration Zone)(Consequential Provisions) Act No.128 2001; Migration Legislation Amendment (Judicial Review) Act No.134 2001; Migration Legislation Amendment Act (No.1) No.129 2001; Migration Legislation Amendment Act (No.6) No.206 2001; and Border Protection (Validation and Enforcement Powers) Act No.126 2001. For fuller

interception/interdiction³⁴ at sea. This package of legislation came into force on September 27 and introduced a dramatic innovation when it “excised” certain outlying territories from the Australian “migration zone.”³⁵ Refugees who reach these excised places can no longer make asylum claims in Australia. Instead, they are likely to be transferred elsewhere and must apply to enter Australia or other third countries by resettlement.³⁶ At the time of writing, the government was planning to excise additional large portions of the Australian coastline.³⁷ Both the present and proposed “excisions” erect serious obstacles to the right to seek asylum in Australia.

Australia negotiated agreements with New Zealand, Nauru, and later Papua New Guinea, to take intercepted asylum seekers. During September and early October, intercepted arrivals were detained on the excised territory of Christmas Island or on board Australian naval ships until they were taken to Nauru or Papua New Guinea and confined in camps run by the International Organization for Migration (IOM).

The interception policy was to be used for an even harsher purpose, however. Under “Operation Relex,” two boats that arrived in late October were intercepted, detained, and then returned to Indonesian waters against the will of those on board. Indonesia was notified, but no specific reception arrangements were made and no agreement was in place guaranteeing the protection of the intercepted refugees from *refoulement*.³⁸ The last boat from Indonesia to be disembarked onto an excised territory arrived at Ashmore Island on November 8, 2001, with 160 people on board. They were transferred from there to Christmas Island and then to Nauru and Papua New Guinea. In December 2001, two further boats were forcibly returned to Indonesian waters. In total, twelve “suspected illegal entry vessels” were intercepted by Australia between September 7 and December 16, 2001. One boat that, unfortunately, was not intercepted was “SIEV X” which sank with great loss of life on October 19, 2001, just beyond Indonesian waters. On November 8, 2001, two female asylum seekers died in the course of an interception operation

summary of the new legislative regime, *see* Penelope Mathew, “Refugee Protection in the Wake of the Tampa,” 96 *American Journal of International Law*, July 2002.

³³ Border Protection Act (Validation and Enforcement Powers) Act 2001.

³⁴ “Interception” includes any actions – including visa requirements or document checks in international airports – which prevent a migrant or refugee from entering a territory, whereas “interdiction,” most commonly used in the U.S. context, is a specific form of interception that prevents a vessel transporting alien migrants or refugees from reaching a state’s shores. For this report, however, the term “interception” will be used to describe both legal and physical actions, including interdiction. It should be noted that the Tampa incident and subsequent “push-backs” at sea have been only a cruder extension of the Australian government’s long-standing bureaucratic policy of interception involving visa requirements, airport document checks and carrier sanctions. UNHCR has defined “interception” as “encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.” UNHCR, “Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach,” June 9, 2000, para. 10, EC/50/SC/CRP.17.

³⁵ The Migration Act 1958 original reference, in Section 5, defines to “enter Australia” as to “enter the migration zone” and this in turn is defined as “(a) land that is part of a State or Territory at mean low water; and (b) sea within the limits of both a State or a Territory and a port; and (c) piers, or similar structures, any part of which is connected to such land or to ground under such sea; but does not include sea within the limits of a State or Territory but not in a port.”

³⁶ The “excised offshore places” were Christmas Island, Ashmore and Cartier Islands, Cocos (Keeling) Islands, any sea or resources installation and any other territory to be named by future regulations pursuant to this Section 5(1) of the Migration Act. *See* Migration Amendment (Excision from Migration Zone) Act 2001.

³⁷ After failing to introduce it as a regulation, the government introduced the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 with regard to excising a further 5000km (3000 miles) of northern coastline and islands (all the way from Exmouth in Western Australia to the Coral Sea in Queensland). A spokesman for DIMIA said they “could not rule out” excising Tasmania. *See* “Warning of new refugee boats on way” *The Australian*, June 10, 2002.

³⁸ *See* note 11.

near Ashmore Reef by the Royal Australian Navy and Australian Customs. At the time of writing, the deaths are the subject of a coronial inquest by the West Australian Coroner.

Because of these deterrent actions, as of August 2002, no unauthorized boats of asylum seekers had arrived in Australia's "migration zone" — that is, in territory that has not been excised — for a full year.³⁹ Refugees living in Indonesia inform Human Rights Watch that there are no more than a handful of new arrivals from the Middle East or South Asia⁴⁰ and that people-smugglers no longer look to Australia as a feasible "asylum country." There has been a 54 percent drop in the number of asylum seekers arriving in Australia in the past year, with only 3,284 people, mostly air arrivals, lodging applications.⁴¹ This compares, for example, to a 7 percent fall in asylum applications in Europe between January and June 2002.⁴²

Under this so-called "Pacific Solution" or "Offshore Strategy," Australia used third states and inter-governmental organizations as its agents, and in so doing, shirked its own responsibilities to refugees. At the same time, all of Australia's actions implicitly recognized that its protection obligations had been triggered by the entry of asylum seekers into its territorial waters.⁴³

Conclusion

Australia's interception policy and the "Pacific Solution" is a pernicious expression of the Australian government's view that the most fitting way to deal with refugees whom, it argues, should have sought protection elsewhere is simply to send them elsewhere. Yet many of the refugees making secondary movements to Australia were unable to find and enjoy effective protection in their countries of first asylum in the Middle East and South Asia, nor in the transit countries of Southeast Asia through which they had passed.

Every refugee or asylum seeker should be given the opportunity to rebut a presumption that they have already found effective protection before being penalized or denied access to asylum procedures in the state where they ultimately arrive. Australia's policy almost never affords them this opportunity because it is based on certain assumptions about who "secondary movers" are and why they move. In reporting their accounts in the following sections, Human Rights Watch challenges those assumptions.

IV. WHY REFUGEES FLEE THEIR OWN REGIONS

Deteriorating refugee protection

The Australian government justifies its restrictive entry policies by arguing that refugees coming to Australia could and should have sought protection in the country to which they first fled. In its interviews with refugees in Indonesia and Australia, Human Rights Watch found that in many cases this was

³⁹ A tiny number of asylum seekers have reached Australia's excised territories, for example, a boat from Sri Lanka that arrived in the Cocos Islands on December 19, 2001.

⁴⁰ This information contradicts statements made by the Australian Immigration Minister, Philip Ruddock, on June 23, 2002, that there are around 1,000 unregistered persons, apart from those in the care of IOM or UNHCR, in Indonesia, "who are simply washing around in Indonesia at the moment looking at smuggling opportunities." See "Asylum seekers waiting in Indonesia, says Ruddock," Agence France-Presse, June 24, 2002.

⁴¹ This report does not examine the deterrent treatment of asylum seekers arriving without authorization by air, who, if they claim asylum at the airport when they arrive, are denied access to any social welfare support while living in the community and pursuing their application.

⁴² UNHCR Statistics, Population Data Unit/PGDS, August 7, 2002.

⁴³ See Human Rights Watch interview with DIMIA (Offshore Management), May 2002. Human Rights Watch: "In which country are these people seeking asylum?" DIMIA: "You are asking the wrong question. Better to ask whose protection obligations have been engaged, and it is clearly Australia's — Australia is the country whose protection obligations have been engaged."

impossible. Refugees who had been living in Iran, Pakistan, Syria and Jordan described why they were not safe in these countries and how their basic rights were violated on a daily basis.⁴⁴ For many, the lack of legal status, severe restrictions on employment and freedom of movement, denial of access to health care, education and housing, combined with constant risks of arrest, detention and deportation, made survival in countries of first asylum extremely precarious.

Iran

Many of the refugees who fled to Australia had previously spent several years, and in some cases most of their lives, living as refugees in Iran. Prior to September 2001, Iran hosted some 2.3 million Afghan refugees and some 300-400,000 Iraqi refugees.⁴⁵ The vast majority lived in urban areas – the Afghans predominantly in the two eastern Iranian provinces bordering Afghanistan, and the Iraqis mostly in Shiraz, in the south, and Qom, near Tehran.

In pre-revolutionary times, refugees in Iran were issued “white booklets” providing entitlement to a number of social and economic benefits. After the Islamic Revolution in 1980, these booklets were issued only rarely, and even then to highly educated or prominent refugees. The Ministry of the Interior provided other Iraqis and Afghans with residence permits calling them “involuntary migrants.” In 1993, the Ministry began to issue newly arriving Afghans with temporary registration cards, which presumed their imminent repatriation. By 1995 the Iranian authorities had restricted refugees’ entitlements to education, medical care and food rations. They declined to register new arrivals, creating a large undocumented refugee population.⁴⁶

President Mohammad Khatami was elected in 1997 on a platform of “Iran is for Iranians” and his government introduced even more hostile policies towards refugees, particularly ethnic Tajiks and Hazaras.⁴⁷ The Afghans’ temporary registration cards were declared invalid, turning this refugee population into “illegal aliens” liable for deportation. Khatami’s labor ministry also denied refugees’ access to all but the most menial forms of employment. The laws against employing refugees were enforced only sporadically until 1999, when a more systematic crackdown began. The government also set deadlines for refugees to leave the country and attempted to confine refugees to camps and designated residential areas, which were viewed by many refugees as staging points for forced deportations. The first reports of forced returns to Iraq were confirmed in July 1999 and the U.S. Committee for Refugees has estimated that some 100,000 Afghans were forcibly returned to Afghanistan that year.⁴⁸

However, it was the introduction of draconian new laws in April 2000 made life untenable for refugees in Iran. “Article 48,” contained in an annex to the government’s five-year development plan, instructed the Ministry of Interior to expel all foreigners without work permits whose lives would not be threatened upon return to their country of origin. A registration drive by the Iranian government followed, between January-April 2001, but the new registration documents brought no status or entitlements to assistance and lifted none of the restrictions on refugees’ social and economic rights. There was, however, a commitment given by the Iranian government to refrain from forcible return of registered foreigners to Afghanistan.⁴⁹

⁴⁴ All interviews related to conditions in these countries prior to September 11, 2001.

⁴⁵ UNHCR Tehran estimate, 2001.

⁴⁶ Contrary to guidance in UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status*, (HCR/IP/4/Eng) which states in Preface, (ii): “the determination of refugee status is incumbent upon the Contracting State in whose territory the refugee himself at the time he applies for recognition of refugee status.”

⁴⁷ Refugee Council of Australia, “Report on Refugee Council of Australia (RCOA) Field Visit to Iran,” December 2001.

⁴⁸ See U.S. Committee for Refugees, *World Refugee Survey 2000*, Iran.

⁴⁹ Letter from UNHCR to Human Rights Watch, received November 20, 2002.

In June 2001, with the reelection of President Khatami, the restrictions on access to employment were further tightened. All refugees except those with the old “white booklet” were classified as illegal workers and subject to expulsion under “Article 48.” A new policy of fining and imprisoning employers of undocumented workers was introduced. Many refugees were immediately fired from their jobs, and thereby lost their homes and all entitlement to medical care as well. They had no access to state social security or any other safety net. Although Khatami decreed that even undocumented children would be permitted to attend school, local authorities continued to deny refugee children entry to public schools and forcibly closed down those organized by Afghan refugees themselves.⁵⁰ The new laws prohibited Afghan refugees from owning property or selling their goods in domestic markets, and the authorities almost always denied refugees permits to export.⁵¹

The Iranian government conducted urban sweeps, arresting thousands of so-called illegal aliens. Many were then held in closed camps, while tens of thousands were forcibly deported. UNHCR estimated that 82,000 Afghan men and 8,300 families, including refugees who were both registered and unregistered, were forcibly returned to Afghanistan between January and July 2001 alone.⁵²

In short, the vast majority of Afghan and Iraqi refugees were systemically denied the means to subsist by Iranian law, irrespective of the number of years they had been in the country. This was the primary reason why many refugees decided in 1998-2001 to leave Iran and go in search of an asylum country that would grant them a secure legal status. Human Rights Watch interviewed refugees in Australia, or stranded in Indonesia because of Australia’s deterrent policies, who explained how these conditions in Iran had driven them away.

Lack of legal status and denial of social and economic rights

An Iraqi woman named Leila, now in Indonesia with her husband and two children, recounted how she has lived almost her entire life as a refugee. She and her parents were originally exiled to Iran in 1980, when she was ten years old. She lived in Esfahan for twenty years and started a family there. Although they had residence permits, Leila explained how conditions deteriorated over time:

[A]fter the death of Khomeini most Iraqi men were thrown out of their jobs and under Khatami they were banned from working and we had to obtain papers from the police if we wanted our children to attend school. My own children began to mention that they were treated differently at school and Iranian neighbors began to curse me in the street, saying, “Why do you take our food? Why don’t you go home?”...We saw that our children would become adults without nationality, just as we had done, and we asked ourselves “How long can this go on?”

When Leila’s husband lost his job a second time as a result of the 1999 crackdown on unauthorized workers, he decided to leave Iran for Australia. After his departure in January 2000, life became increasingly difficult for Leila. She was not permitted to work, had no income for four months, and sold nuts in the street illegally in order to feed her children. The first she heard from her husband was when he was arrested in Kupang, Indonesia, and was awaiting a decision on his claim by UNHCR. Three months later, despite his urging her to wait, Leila collected all the money she could from friends and relatives and left with her children to rejoin her husband where he was by then living as a recognized refugee under UNHCR protection in Jakarta.⁵³

⁵⁰ This was in violation of articles 28 and 29 of the *Convention on the Rights of the Child*, G.A. Res. 44/25, 44 UN GAOR, Supp. No. 49, U.N. Doc. A/44/49, 1989, entered into force September 2, 1990.

⁵¹ Refugee Council of Australia, “Report on Refugee Council of Australia (RCOA) Field Visit to Iran,” December 2001.

⁵² UNHCR, “Mid-Year Progress Report on Iran,” 2001.

⁵³ Human Rights Watch interview, No. 4, Cisawa, Indonesia, April 10, 2002.

An Iraqi woman named Ama, who had fled to Iran in 1993, told Human Rights Watch how she and her family had lived in Tehran without difficulty for several years. After the draconian crackdown on refugee employment in 2001, however, her husband was turned away from every job for three months. Without a residence permit or any other form of legal identification, they were unable to buy property or enter their sons in higher education. Her sons had no right to marry Iranian citizens, even Iraqi women who were naturalized.⁵⁴ Many others recounted similar stories of discrimination due to lack of status.⁵⁵

An Iraqi man named Wali, now stranded in Indonesia, described what happened to his sisters, wife and son after they were refused legal documents, despite the fact that he himself had a residence permit and his mother and brothers were also documented. His son could never attend school in Iran, he explained,

And there were other more grave consequences for these unregistered members of my family. If they were injured or attacked by Iranians, they could never sue or go to the police. If they were accused of any minor crime, they might be returned to northern Iraq. My sister was diabetic and could not qualify for any medical treatment or social security. They could not move freely between the cities and towns, they could not open bank accounts, they would be terrified every time a policeman approached in the street... They had no legal existence. I knew of one Iraqi man who was beaten up by an Iranian and tried to sue, but the religious court told him "You are dreaming..."

After the enactment of the June 2001 laws, Wali was promptly fired from his job as a tailor and could find no other way to earn a living. He and his family took advantage of the fact that the Iranian authorities were offering refugees one-way "aliens passports" and left the country by air for Malaysia on September 11, 2001.⁵⁶

Such stories are not merely evidence of economic hardship. In some cases, they constitute persecution by cumulative economic means, on the grounds of nationality, within the meaning of the Refugee Convention.⁵⁷ Such persecution is inflicted upon refugees, irrespective of the duration of their residency in Iran, with the clear purpose of pressuring them to leave the country.

⁵⁴ Human Rights Watch interview, No.11, Jakarta, Indonesia, April 12, 2002. *See also* Human Rights Watch interview No.12 for similar circumstances. In October 1999, 55 Iraqi intellectuals in Qom sent a letter to Iranian officials, charging that they were discriminated against in terms of lack of legal status – preventing them from opening bank accounts, owning property, marrying Iranian citizens and moving freely within the country. U.S. Committee for Refugees, *World Refugee Survey 2000*, p.184.

⁵⁵ A Kurdish Iraqi mother who is now living on a temporary protection visa in Australia stated: "My biggest worry is that we will be sent back when our visa expires. It is a kind of permanent insecurity. No one will give us a legal visa: not the Iranians, not the Australians...I have never had a stable condition in my whole life, since I was born until now [she is 27]. I am afraid that my child will have the same life." Human Rights Watch interview, No. 43, Sydney, Australia, April 21, 2002]

⁵⁶ Human Rights Watch interview, No. 28, Mataram, Indonesia, April 18, 2002.

⁵⁷ For such discrimination to amount to persecution it must cause the individual "serious harm." This is one of the tests developed by Prof. James Hathaway and now widely applied to determining whether a human rights violation amounts to persecution within the meaning of the Refugee Convention Article 1. *See* James Hathaway, *The Law of Refugee Status* (Toronto, 1991), pp.103–5. *Also See* p.121 for examples of breaches of economic, social and cultural rights, such as denial of right to remunerated work, which may amount to "serious harm". "Serious harm" is defined in the Australian Migration Act 1958, Section 91R, where it includes: "a threat to the person's life and liberty; or significant physical harassment of the person; or significant physical ill-treatment of the person; or significant economic hardship that threatens the person's capacity to subsist; or denial of access to basic services, where the denial threatens the person's capacity to subsist; or denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist."

"[R]esident internationally unprotected persons, such as refugees and stateless persons, might be objects of human rights abuse by reason of their status as 'foreigners'...[T]hose who cannot enjoy meaningful protection elsewhere

Risks of arrest, detention and forced return

Denied the right to work, refugees in Iran are at constant risk of arrest and forced return (*refoulement*) if caught working illegally. Fear of arrest also restricted refugees' ability to move freely around the country. For many, these restrictions were motivating factors in deciding to leave Iran.

In Australia, a seventeen year old Iraqi boy named Mohammed, who grew up as a refugee in Iran after his family fled the bombing in 1991, remembered his parents' fear of arrest after the laws banning them from working as a taxi-driver and seamstress were passed in 1997. At least six times during 1998 and 1999, he claims, he himself had to run from the police in the streets to escape arrest and possible deportation. "This was normal for teenaged Iraqi refugee boys," Mohammed said.⁵⁸

Farwat, a Hazara man from Mazar-i Sharif in Afghanistan, was arrested by the Iranian police as an illegal alien in 1997, when he was sixteen, for working without permission in a shoe repair shop. He spent three months in a prison in Zahedan for adult male convicts. Because of overcrowding, Farwat was forced to sleep every night in the passageways or toilets. He told Human Rights Watch how Iranian prisoners were given preferential treatment. As an illegal immigrant he had to eat the guard's scraps and bribe them just to take a shower. Farwat had no money and was able to wash only once during three months, in exchange for a gold chain he wore around his neck.

For the final two months of his detention, the Iranian police moved Farwat to a desert camp with an electric fence. There were many other Hazara boys under eighteen there. They received just one meal a day, and they were so afraid of the desert snakes and spiders they believed to be lethal that they found it hard to sleep. Farwat said that the camp guards frequently beat them for no reason, sometimes with electric cords. "Also they made us stand and sit, stand and sit, again and again very fast in the yard in the sun. I myself was beaten almost every day of the two months I was there." Farwat told Human Rights Watch that the only way to get out of this camp was to pay a bribe, but Farwat's brother-in-law did not come to pay for his release. At the end of five months in detention, Farwat was deported back to Afghanistan by Iranian authorities:

When the camp inmates became one thousand, then they decided to return some of us. They got everyone with money in their pockets to turn it in and first they returned those people who could pay for their own bus fare. Then they counted the leftover money that they had stolen and calculated how many others they could afford to return. I was one of the people randomly selected to go.

Four Iranian soldiers accompanied them on each bus. Following his return, weak with malnutrition, he made his way home to his parents' village near Mazar-i Sharif and pleaded to stay, but his father sent him away again, to avoid conscription by the Taliban.⁵⁹ Farwat spent three more years in Iran, again living illegally, in constant fear of arrest. When he turned twenty, he chose to return to Afghanistan, unable to bear the hardship of illegality in Iran any longer. His father remained fearful for his safety,

[e.g. in their country of formal nationality] are properly assessed as refugees in accordance with the concept of state of former habitual residence." Hathaway, *The Law of Refugee Status*, p.144.

⁵⁸ Human Rights Watch interview, No. 39, Melbourne, Australia, April 3, 2002.

⁵⁹ In May 1997, some 2,000 Taliban prisoners were summarily executed by ethnic Hazara and Uzbek forces, which led to a series of reprisals culminating in the massacre by the Taliban of some 2,000 civilians in Mazar-i Sharif in August 1998 and threats by the newly installed Taliban governor of that city that Hazaras would be killed if they did not convert to Sunni Islam or leave Afghanistan. This was around the time that Farwat departed this region. See Human Rights Watch, "Afghanistan: the Massacre in Mazar-i Sharif," *A Human Rights Watch Report*, vol. 10, no. 7, November 1998.

however, and in mid-2001, sent him abroad once more, this time with a smuggler, via Pakistan, toward Australia.⁶⁰

In many cases, refugees in Iran had tolerated discomfort and discrimination for years and only made the decision to leave the region when the Iranian government hardened its policy into one of encampment and expulsion. Some refugees cited their own experience of forced deportation and *refoulement* to explain why they had left the region. A Hazara refugee named Fahim, now in Australia, described to Human Rights Watch how he fled first from Afghanistan to Pakistan, where he was arrested and nearly *refouled*, then onto Iran where he remained for three years. He says he was arrested by the Iranian police for lacking a residence permit while attempting to make contact with the UNHCR office in Tehran. They sent him to a camp in Zahedan province, where he spent two months along with some 500 other detainees before being forcibly deported back to Nimruz in Afghanistan. He remembered those two months in the camp: “They just kept us there to deter us from ever coming over the border again. They made us stand in the noon sun for hours or hop on one leg. There were constant humiliations and the guards thought nothing of kicking you...”⁶¹

The Iranian police dumped Fahim in the town of Zaranj near the border. It took him two days to travel back to his own village. Because he was a Hazara, on the way through Kandahar he was subject to a Taliban road check. This was only three days after the Taliban had been defeated in a battle in northern Afghanistan by a largely Hazara political faction so they were taking retributive actions against Hazaras across the country. The Taliban arrested him and sent him to prison for three months. There he claims he was severely tortured “in a way that still affects my psychological health,” subjected to mock-executions, starved and made to perform forced labor. His weight dropped 22 kilos in three months and “lost everything except my breath.” Finally, the Taliban executed the stronger prisoners and then traded the weak ones, like him, for their own prisoners of war. He was thereby freed and returned to his own village in Hazarajat in 1997. In 1998, Fahim had to flee Afghanistan a second time, again because of persecution related to his ethnicity. This was when he decided to leave the region altogether and head for Australia. On arrival in Australia he was detained at Woomera Detention Centre for nine months. The psychological impact of this experience, which, he said, prompted nightmares of both the Iranian refugee camp and imprisonment by the Taliban, was devastating.⁶²

Rumors of such arbitrary arrests and summary deportations are enough to make many refugees move swiftly through the region. One Iraqi doctor and his wife, for example, who were wanted by the Iraqi authorities for giving emergency medical treatment to Kurdish rebels forbidden such treatment, fled in January 2000 to a house in Qasr-e Shirin in Iran. They then moved to Qom where the doctor had a cousin, but they only stayed in Iran for twelve days because, during that time, he witnessed some Iraqi army deserters suspected by Iran of espionage being forcibly returned to the Iraqi army despite their fears of persecutory penalties.⁶³

Rashad, a twenty-seven year old Hazara, was interviewed by Human Rights Watch in Indonesia after being intercepted and turned away by Australia. He told how his knowledge that a member of his extended family had experienced *refoulement* from Iran informed his own fear of *refoulement* from neighboring Pakistan. After his father’s three-month imprisonment and torture by the Taliban, Rashad’s mother begged her son to flee from Ghazni province in June 2001 to avoid arrest or conscription. His uncle found some smugglers in Ghazni City and an address for Rashad to contact once he reached

⁶⁰ Human Rights Watch interview, No. 21, Mataram, Indonesia, April 17, 2002.

⁶¹ Human Rights Watch interview, No. 40, Melbourne, Australia, April 3, 2002.

⁶² Ibid.

⁶³ Human Rights Watch interview, No. 1, Jakarta, Indonesia, April 8, 2002. The doctor and his wife were intercepted on their attempt to leave Indonesia for Australia and are now recognized as refugees by UNHCR Jakarta, awaiting resettlement in Canada.

Pakistan. He went to Quetta but stayed there just eighteen days, then spent twenty days in Karachi. He did not stay longer, he explained, because:

I was afraid of being returned to Afghanistan, as my nephew [grandson of his uncle] had been when he tried to flee to Iran a few years ago. We had heard that he was returned to Herat and then picked up by the Taliban who put him into Kandahar prison, and then we never heard about him again.⁶⁴

Pakistan

The refugee protection situation in Pakistan during 1998-2001 was similar to that in Iran insofar as the vast majority of the country's two million refugees lived without any legal status. Pakistan is not a signatory to the Refugee Convention. Since late 1999, the government has refused to consider newly arriving Afghans as *prima facie* refugees.⁶⁵ Undocumented refugees, like other foreigners unlawfully present, are therefore plagued by constant risk of arrest and detention, while even refugees who were registered in the early 1990s may have restrictions placed on their freedom of movement and place of residence.⁶⁶ Undocumented refugees, particularly ethnic Tajiks, Uzbeks and Hazaras, are also vulnerable to harassment and extortion by the Pakistani authorities. If refugees do not pay up, they can be imprisoned and possibly deported. This is true even in the well-established Afghan community of Quetta,⁶⁷ where authorities at the District Prison told Human Rights Watch in December 2001 that most of the Afghans in their facility were held for violating the Foreigners Act and Order.⁶⁸

Risk of forced returns

Forcible returns from Pakistan to Afghanistan have occurred periodically.⁶⁹ In 1999, for example, over 150 Hazaras were forced back from Quetta after an urban sweep and between October 2000 and May 2001, some 7,633 Afghans were returned because of their undocumented status, with no opportunity to claim protection from *refoulement*.⁷⁰ Several Hazara refugees interviewed by Human Rights Watch in Indonesia and Australia had avoided summary return to the hands of their persecutors only by bribing the Pakistani police for release after being arrested as illegal migrants at the border or while living in Karachi, Peshawar and Quetta.⁷¹

⁶⁴ Human Rights Watch interview, No. 18, Mataram, Indonesia, April 16, 2002. *See also* Human Rights Watch interview, No. 19, Mataram, Indonesia, April 16, 2002 and Human Rights Watch interview, No. 20, Mataram, April 15, 2002 for similar reasons for transiting quickly through Pakistan.

⁶⁵ In August 2001 there was hope for improvement in conditions as Pakistan allowed UNHCR to participate in a joint registration and screening of refugees in New Jalozai, but the screening operation only lasted from mid-August until August 28, and then again briefly for eight days between September 3-11.

⁶⁶ *See* Pakistan's Foreigners Order of October 1951, promulgated pursuant to the Foreigners Act of 1946.

⁶⁷ This de facto integration sometimes causes these refugees to be confused with Pakistani nationals in linguistic or other nationality tests used by Western adjudicators. The Australian Department of Immigration expressed its skepticism as early as 2000, stating that "a significant percentage of people who claim to have traveled directly from Afghanistan have in fact been long term residents of Quetta or Peshawar in Pakistan". DIMIA, "Protecting the Border: Immigration Compliance," 2000. Human Rights Watch's findings in this report, on the contrary, suggest that duration of residence in Pakistan bears no necessary relation to the quality of protection afforded to an individual refugee.

⁶⁸ Human Rights Watch interview with Quetta District prison authority, December 1, 2001. Human Rights Watch, "Closed Door Policy: Afghan Refugees in Pakistan and Iran," *A Human Rights Watch Report*, vol.14, no.2 (G), February 2002.

⁶⁹ It must be repeated that this section relates only to returns prior to September 2001, the period during which the refugees intercepted by Australia were in transit. Since the fall of the Taliban there have been vast numbers of spontaneous returns to Afghanistan from neighboring countries. *See* Human Rights Watch, "No Safe Refuge," *A Human Rights Watch Backgrounder*, October 18, 2001.

⁷⁰ *See* "UN Study on Forced Returns of Afghans from Pakistan," May 2001.

⁷¹ *See, for e.g.,* Human Rights Watch interviews Nos.19, 30 and 40.

A Hazara man, Behrooz, fled with his family to Pakistan in May 2001, after the Taliban arrested and tortured his brother. He immediately went to one of the UNHCR's offices and told officials, "We are in danger, please help us. The Taliban are following us and may arrest me." But UNHCR, he claims, did not take him seriously. About ten days later, three ethnic Pashtun Afghans came with two Pakistani policemen and abducted/arrested him. He was separated from his wife and three young sons, bundled into a car and driven back across the border. In the car a member of the Taliban was sitting behind him and he was between the two Pakistani policemen. At the border, the policemen got out of the car and the Taliban took him alone at gunpoint back to the town of Qasr-e Akbar Khan. He was taken from there to the house of the Taliban Deputy Foreign Minister, where he was kept under armed guard for fifteen days. When interrogated, he was asked about his family. Behrooz told them that they were in Pakistan with no one to support or protect them. The Taliban told him that if he paid US\$50-60,000 they would release him. "I thought I would be killed because I did not have enough money to pay them. When we were left alone I begged one guard to take pity on me, telling him about my family. Finally I promised him \$2000 and the two of us escaped together in the night." He and his former captor fled back over the Pakistani border but when he returned to his house, he found his family had disappeared. He felt it was too dangerous to stay in Pakistan and search for them, so he decided to make a deal with smugglers and leave the region. When interviewed by Human Rights Watch, Behrooz was alone in Indonesia and still had no news of his family's whereabouts. He feared that his wife had been sold in the market at Miram-Shah.⁷²

Threats from agents of persecution operating across borders

Hazara Afghans were not alone in feeling unsafe in Pakistan during the period in question. A Pashtun refugee named Faizan, who was expelled by Australia to Indonesia in October 2001, said that he was one of an extremely small Shi'a Muslim minority in his village of Hasankhal. People he believed to be affiliated with the Taliban shot two of his cousins in the village sometime in mid-February 2000, so the next evening, Faizan headed for the Pakistan border. A friend gave him the address of someone in Peshawar, with whom he stayed for three days. After two days, his father followed, bringing money for Faizan to buy a fake passport. "I wanted to stay there [in Peshawar], but there were too many Afghans, including many Sunnis who would persecute us just like at home," Faizan explained. He himself knew of two Shi'a Muslim neighbors who had fought the Taliban to retain their property and then fled to Pakistan where they were caught by a Taliban cell operating in Pakistan within five days and had their throats slit. "The Taliban had brought their corpses back to my village as a warning. I saw these mutilated bodies with my own eyes, and remembered them too well to think that Pakistan was a safe country for someone like me."⁷³

Many Hazara refugees also told Human Rights Watch that they had not set foot outside of smugglers' houses in Pakistan for fear of Taliban operatives in Pakistan.⁷⁴ A former High Court Judge under the Taliban regime, who fled when he refused to implement their discriminatory laws against the Hazara, feared persecution from the Taliban and former Mujahidin members in Pakistan. He therefore spent only three days in Pakistan before contacting smugglers who could get him quickly out of the region.⁷⁵ Another Afghan family, one of Tajik ethnicity, similarly claimed that the presence of former Mujahidin operatives in Peshawar had made them leave Pakistan after hiding there ten or fifteen days in early 2001.⁷⁶

Jordan and Syria

Neither Jordan nor Syria have signed the Refugee Convention, neither has domestic laws to protect Iraqi or Afghan refugees and neither wishes to be considered countries of asylum for these nationalities.

⁷² Human Rights Watch interview, No. 32, Mataram, Indonesia, April 19, 2002.

⁷³ Human Rights Watch interview, No. 24, Mataram, Indonesia, April 18, 2002.

⁷⁴ See, for e.g., Human Rights Watch interview, No. 29, Mataram, Indonesia, April 18, 2002..

⁷⁵ Human Rights Watch interview, No. 26, Mataram, Indonesia, April 17, 2002.

⁷⁶ Human Rights Watch interview, No. 17, Mataram, Indonesia, April 15, 2002.

Nevertheless, Jordan hosts some 250-350,000 Iraqis.⁷⁷ Of this population, approximately 1,000 recognized refugees are registered with UNHCR, awaiting resettlement, and another 4,300 are awaiting refugee status determination by UNHCR.⁷⁸ Toleration of the refugees' *de facto* presence is contingent upon UNHCR resettling or returning all processed cases, as stated in an agreement signed between UNHCR and Jordan in April 1998. Syria, meanwhile, has over 3,200 recognized refugees registered with UNHCR, awaiting resettlement.

As explained below, access to protection through status determination and resettlement by UNHCR can be highly problematic. Consequently, many refugees who would have valid claims under the Refugee Convention remain in these countries without registering, usually overstaying their initial visitor's visas. Endemic corruption makes these undocumented refugees vulnerable to harassment and extortion by the Jordanian and Syrian police in order to avoid arbitrary arrest or *refoulement*. Although the Syrian government denies forcibly repatriating refugees, an undetermined number of Iraqis were reportedly *refouled* to northern Iraq in 1999 and several hundred were expelled in December 2001.⁷⁹ Such returns intimidate other refugees from coming forward to register.

Lack of legal status

In the interval between expiration of an initial six-month visitor's visa automatically granted to Iraqi nationals and resettlement, refugees have no legal status and thus no access to the labor market, public education or health care, nor any legally enforceable guarantee against deportation. Often Jordanian visitor's visas expired before refugees had managed even to have their first interview appointment with UNHCR.

In Indonesia, Human Rights Watch interviewed several Iraqis who had made secondary movements out of Jordan and Syria. One mother of four described how the Iraqi authorities harassed her over her husband's unauthorized departure in September 1999, so she fled to Jordan. She chose to go there because it was the only legal land route that did not require a visitor's visa to be obtained in advance, but she stayed in Amman for just two weeks because she knew that her visa was only valid for six months and saw no likelihood of improvement in the situation in Iraq during that time, so she asked, "Why should I have wasted time waiting for my visa to expire in a country where I knew they wouldn't allow me to stay for longer?"⁸⁰

One fifteen year old Iraqi boy, named Jasim, interviewed by Human Rights Watch while held in detention in Australia, recalled that his family had fled from a camp in Jordan in 1999 when the Jordanian authorities started to expel refugees. They went to Syria where they overstayed their three-month visitors' visas and his father worked illegally, but they again lacked legal status. That drove the family to smuggle themselves to Australia, a country where they had heard refugees could gain protection visas that lasted more than just a few months and where refugee children were allowed to go to school – though in fact Jasim spent nearly three years in detention in Australia, with virtually no access to education.⁸¹

Threats from agents operating across borders

Other refugees presented the same logic for their rapid transit through Jordan. They also expressed fear of approaching the UNHCR offices in Amman because Iraqi intelligence agents watched the surrounding streets.⁸²

⁷⁷ There are no reliable figures for this mostly undocumented population. This is the estimate of a Human Rights Watch researcher on Jordan and Iraq.

⁷⁸ For explanation of UNHCR refugee status determination procedures, see the section, Return to Indonesia – The Role of UNHCR.

⁷⁹ See U.S. Committee for Refugees, *World Refugee Survey 2002*.

⁸⁰ Human Rights Watch interview, No. 6, Cisawa, Indonesia, April 11, 2002.

⁸¹ Human Rights Watch interview, No. 38, Sydney, Australia, April 6, 2002.

⁸² See, e.g., Human Rights Watch interview, No. 7, Cisawa, Indonesia, April 11, 2002.

An Iraqi refugee named Ali, now in Indonesia, told Human Rights Watch how he had fled to Jordan after torture in an Iraqi prison. Ali spoke of his fear of arrest and deportation after his visa expired, having witnessed Iraqi refugees registered with UNHCR being forcibly deported back to Iraq in 1999. This pushed him to move on to Syria, which was safer for Iraqis at the time, while his wife preferred to remain behind with her relatives in Jordan. However, the position of Iraqi refugees in Syria also started to deteriorate and UNHCR assistance was only provided to those who had fled directly from Iraq – in other words, Ali was already being classed as an “irregular mover” and penalized by UNHCR as a result. After his wife was killed under suspicious circumstances in 2001, he returned to Jordan to investigate her death and make arrangements for her burial and the care of their son. At that time he became conscious of Iraqi security forces in Jordan monitoring his movements, so Ali decided to flee the region using smugglers.⁸³

UNHCR becomes complicit in the deterrence of secondary movers when its policies penalize them, as in the treatment of Iraqis who find life in Iran so intolerable under the “Article 48” laws that they try to move on to Jordan or Syria.⁸⁴ They can be registered as refugees and have the limited security of UNHCR documentation, but they do not receive material assistance. Denied permission to work in Jordan, refugees will be left destitute unless they have independent savings or work illegally.⁸⁵

Conclusion

The Australian government asserts that refugees from countries of asylum in the Middle East and South Asia “are moving voluntarily. Their movement is not forced. They are not directly fleeing persecution.”⁸⁶ Human Rights Watch found these assertions, in many individual instances, to be untrue. Nearly every asylum seeker and refugee from Iraq and Afghanistan interviewed by Human Rights Watch in Australia and Indonesia described compelling reasons for having left their first countries of asylum, often stemming from their lack of legal status and protection. In several cases, refugees were fleeing discrimination that amounted to persecution on grounds of their nationality in their countries of first asylum. In several other cases, they were fleeing ongoing fear of persecution by or return to their original persecutors. The increase in secondary movements to Australia between 1999 and 2001, as well as to Europe and North America during the same period, was directly related to the deterioration of refugee protection in the Middle East and South Asia in the same period.

Limited opportunities for authorized resettlement from regions of origin

Aside from the false premise that all secondary movements are voluntary, official obstacles against refugees who make such movements are based on Australia’s view that they could and should have applied to international agencies for resettlement if they were really at risk.⁸⁷ This view assumes that

⁸³ Human Rights Watch interview, No. 27, Mataram, Indonesia, April 17, 2002. The U.S. Committee for Refugees has noted numerous reports that Iraqi government agents are able to operate freely in Jordan. See U.S. Committee for Refugees, *World Refugee Survey 2000*.

⁸⁴ Some 700 such Iraqis applied for asylum in Syria during 2000-01, according to UNHCR in Damascus.

⁸⁵ In 1995, UNHCR defined an “irregular mover” as “a refugee or asylum seeker who leaves a country where basic protection was available, for reasons other than: family reunion with immediate family members who are not themselves irregular movers in the current country, or a threat to his/her physical security.” UNHCR Memorandum from Regional Meeting on Irregular Movers held in Kuala Lumpur, May 2-4, 1995 (copy on file at Human Rights Watch). Then, in 1997, UNHCR produced its policy on “urban refugees” which stated that “[w]hile...UNHCR’s protection obligations are unaffected by such movement, UNHCR does not have an obligation to provide assistance to refugees after irregular movement on the same basis as it would had there been no irregular movement.” UNHCR, “Policy on Urban Refugees,” 1997, para 17.

⁸⁶ DIMIA, “Principled Observance of Protection Obligations and Purposeful Action to Fight People Smuggling and Organized Crime: Australia’s Commitment,” and also a draft of the same document sent to Human Rights Watch by DIMIA: “Australia’s Commitment to Both Refugee Protection and Combating People Smuggling.”

⁸⁷ Australian Immigration Minister, Philip Ruddock, dwells on the fact that people “would rather engage a people-smuggler and travel halfway round the world in order to put their claims in Australia because they believe they are more likely to get a better hearing than they would if they were assessed by the UNHCR” and answers the refugee

refugees fearing *refoulement* or other serious risks in their first countries of asylum can be assisted to depart in an orderly, timely and properly documented way through the resettlement system.

Resettlement to Australia

After refugees have been through the sometimes lengthy process of UNHCR refugee status determination,⁸⁸ and then have also qualified under one of the eight resettlement criteria, their case might be referred to Australia for consideration. The Australian resettlement system runs two major programs – the Refugee Program, which includes several specific components, such as women-at-risk, and the Special Humanitarian Program.

Australia receives around 64,000 applications a year under these two programs, mostly but not solely referred by UNHCR. A resettlement application can also be made directly to an Australian “Migration Post,” that is, an overseas mission designated and staffed to process immigration and resettlement applications. Australia links the number of “onshore” visas granted to refugees inside Australia with the number of “offshore” (resettlement) places available.⁸⁹ It need not work this way. In most European countries or in the United States, for example, resettlement and territorial asylum places are not linked.

The Australian government attempts to justify its deterrent policies as a matter of principle rather than expediency. It does so by stigmatizing asylum seekers coming from other regions as “queue-jumpers”⁹⁰ who do not wait their turn in the resettlement “queue.” Australia has for a long time viewed its primary role in the international refugee protection regime as that of a resettlement country⁹¹ and has resettled some 600,000 refugees and humanitarian cases since the Second World War. It is only since September 2001, however, that there has been official bias against those who “could have lodged applications for consideration under Australia’s humanitarian programs” but instead chose to come spontaneously. They have been wrongly portrayed as people who “simply do not want to wait.”⁹²

The Australian government also stigmatizes secondary movement, which is not prohibited by the Refugee Convention, by linking it in the public’s mind to the crime of people-smuggling:

advocates who say there is no real queue, by reference to the number of resettlement applications received: “We do have a queue – it has 60,000 people. What we don’t have is a queue which provides a place to everybody who might like one.” March 28, 2002, ‘Insight’ (SBS current affairs program in Australia).

⁸⁸ Draft of DIMIA paper “Complementary Forms of Protection,” September 2001 (sent by DIMIA to Human Rights Watch in June 2002): refers to UNHCR protection officers in countries of first asylum only determining a person to be a refugee if they have a requirement for resettlement.

⁸⁹ In the financial year 2000-01, 13,733 visas were granted (making up for a shortfall in the previous year), of which 7,992 were for offshore (resettled) cases and 5,741 were for onshore (asylum seeker) cases. For 2001-02, there will be 13,645 places available. DIMIA Answers to Question on Notice from the Australian Senate’s Inquiry into a Certain Maritime Incident (henceforth, “CMI”), June 13, 2002.

⁹⁰ Similar to the European term “forum-shoppers,” this term should be read in the context of other political rhetoric hostile to asylum seekers. Australian Senator Ross Lightfoot, for example, on October 11, 2001, referred to the recent arrivals from the Middle East as “uninvited and repulsive people” whose “sordid list of behavior” included scuttling their own boats. The legality of seeking asylum – a human right enshrined in the Universal Declaration of Human Rights – is also denied by Australian politicians’ constant reference to the asylum seekers as “illegal migrants” or simply “illegals.”

⁹¹ Australia, however, has never opened its door very wide to those who managed to reach its shores without an invitation or without a fear of persecution in their last country of embarkation. In January 1995, the Sino-Vietnamese who had arrived by boat via Indonesia, were sent back to China, which was regarded as a safe country of first asylum for this group. Similarly, most of the Ex-China Vietnamese Illegal Immigrants (ECVIIs) were returned from Hong Kong under the Comprehensive Plan of Act (CPA) in 1989-95. According to DIMIA, Australia took greater responsibility for resettling refugees under the CPA because the Vietnamese came from within the Southeast Asian region and so, by inference, had broken the rules against secondary movement to a lesser extent than today’s Afghans and Iraqis refugees. Human Rights Watch interview with DIMIA, May 2002.

⁹² DIMIA, “Unauthorised Arrivals and Detention: Information Paper,” February 2002.

This form of organized crime is found throughout the world and preys on people who are unwilling, for whatever reason, to go through normal procedures for entry to the country of destination. Many of the people moved around the world by these people smugglers have either no protection needs or have bypassed effective protection arrangements in countries closer to their home, simply so that they can achieve their preferred migration outcome.⁹³

This phrase “preferred migration outcome” has been used repeatedly by the Australian government to try to de-link secondary movement with any sense of forced displacement.⁹⁴ Its use obscures the fact that an extremely high proportion of Iraqis, Afghans and Iranians arriving in Australia prior to September 2001 were recognized to be genuine refugees.⁹⁵ It is misleading of the government to state that Australia was running a disproportionately expensive determination system “just to find the relatively few refugees among those who seek asylum.”⁹⁶

Access to resettlement from the Middle East

The first myth to dispel is that anyone can apply for asylum in Australia from inside a country of origin such as Iraq or Afghanistan. This is not possible. Once refugees have left their countries of origin and reached a first country of asylum, they must be processed through UNHCR if they want a resettlement referral.

UNHCR struggles under severe resource constraints, yet these do not fully justify the barriers currently preventing many refugees from gaining information about and access to the resettlement application procedure. The UNHCR office in Tehran, for example, is far from where most refugees reside, inside a walled compound, so many refugees have to apply in writing. That office receives one hundred letters per day, far fewer than the office in Islamabad, which is also “infamous for its access problems.”⁹⁷ In Jordan, many Iraqis have told Human Rights Watch researchers that the Iraqi security forces watch the UNHCR offices, so they could not approach it. To cross the border to seek asylum at UNHCR in Ankara, meanwhile, is risky because Turkey has readmission agreements⁹⁸ to return all migrants who spent more than a short period in transit to Syria, Iran and northern Iraq, without considering their risk of *refoulement*. It is not known how many refugees have been summarily deported or denied entry at the border by the Turkish authorities.

⁹³ Minister for Immigration and Multicultural Affairs, 2nd reading speech on the Migration Amendment (Excision from Migration Zone) Bill 2001, Australian House of Representatives, Hansard, 18 September 2001, 30869.

⁹⁴ See, for e.g., Philip Ruddock, Australian Immigration Minister: “It is important to note that being a refugee does not give a person a right to select their preferred country of protection.” DIMIA Press Release (May 23, 2002).

⁹⁵ The annual rate of recognition for asylum seekers applying in the period 1996/97 to 2000/01 ranged from 89.6-97.6 percent for Afghans; 84.8-96 percent for Iraqis; and from 39.5-78.3 percent for Iranians. DIMIA statistics provided to Human Rights Watch, November 20, 2002. The recognition rate for Iraqi unauthorized boat arrivals who lodged protection visa applications on the Australian mainland in 2000/01 was 91 percent. DIMIA Answers to Question on Notice from the CMI, 13 June 2002. Between November 1, 1999 and May 31, 2001, around 85 percent of 5,936 asylum seekers in detention, the vast majority of whom were unauthorized boat arrivals from these three countries, were recognized to be refugees within the meaning of the Refugee Convention.

⁹⁶ “Australian Statement to Parties to the Convention Related to the Status of Refugees,” UNHCR Ministerial Conference, Geneva, 12 December 2001.

⁹⁷ Refugee Council of Australia, “Report on Refugee Council of Australia (RCOA) Field Visit to Iran,” December 2001.

⁹⁸ A “readmission agreement” is a bilateral, binding agreement governing the return of illegal migrants, rejected asylum seekers and/or asylum seekers and ensuring that the returned individual will be readmitted without penalty. In cases where persons who may be in need of protection are returned, readmission agreements can guarantee that the person will be permitted to apply for asylum in the receiving state.

Accounts from asylum seekers and refugees who have made their way spontaneously to Indonesia and Australia contain many examples of individuals frustrated in their attempts to apply for resettlement through UNHCR.

One Iraqi mother, recently resettled from Indonesia to Australia, told Human Rights Watch how she had tried to go to the UNHCR offices in Tehran five different times during 1998 and 1999. Iranian, Syrian and Lebanese guards talked to her through a window and asked to see her residence permit. When she told them she did not have one, they gave her a small piece of paper with a handwritten appointment and told her to return in a month's time. With this scrap of paper in hand, she returned repeatedly and each time was refused entry or denied an appointment, possibly because she was there on the incorrect day. The last time she went, after her husband had left Iran in late 1999, she tried to tell UNHCR she was in danger because she was a woman living alone, but she claims they ignored her:

I was living in a rented room in the house of a married man. This man was pressuring me to have sex with him, and I was too frightened to tell my sons about it because I was afraid what they might do. So I just stayed in the room and put my sons' shoes outside the door, to trick the man into thinking I wasn't alone. I used to cry every night, and begged my sons to let us move but couldn't tell them why. I had no other friends or family to go to because I was a refugee.⁹⁹

Another Iraqi mother, interviewed in Jakarta, said she could not see the benefit of going to UNHCR in Tehran because she personally knew someone recognized as a refugee by UNHCR there who was still waiting for resettlement after ten years. Her husband once did try to contact UNHCR in Tehran and was told, prior to any examination of their circumstances, that they "had no right to resettlement" — a technically correct statement, which her husband had misunderstood as meaning they had no right to apply. Now, in Indonesia, she is bitter that this failure to apply via UNHCR seems to be held against them: "They [Australia] do not like to resettle us because they call Iran a refugee country and think we were O.K. there just because Iran has signed the [Refugee] Convention. They don't seem to know that they didn't even give us identity documents."¹⁰⁰

In a case described in the previous section, the attempt to approach UNHCR offices directly precipitated *refoulement*: Fahim, a Hazara refugee now recognized by Australia, went to the Australian embassy in Tehran in 1995 and again in 1996 and tried to tell them that "I can't feel safe and secure in Iran and they will never let me become legalized here." They gave him the address of the Australian embassy in Greece and told him to write there to apply for refugee status. He filled in a form and sent a letter to Athens and waited three months for a reply, which just referred him back to the UNHCR office in Tehran. When he tried to enter the UNHCR office in 1997, Iranian security guards stopped him. Twice he tried to sneak past them, and the third time he confronted the guards, demanding the right to enter in stronger terms. The guards asked to see his residence permit and when he could not produce one they took him to police headquarters. His arrest ultimately led to his *refoulement* by the Iranian authorities — a direct result of his effort to seek effective protection.¹⁰¹

Sara, a Hazara woman whose boat was intercepted by Australia and pushed back to Indonesia in October 2001, had been living with her husband and baby daughter in Rezo, near Mashhad, after March 1999. There they fell into one of the urban police sweeps to arrest refugees without residence permits ("illegal migrants") during June 2001, despite the fact that she held UNHCR paperwork:

⁹⁹ Human Rights Watch interview, No. 11, Jakarta, Indonesia, April 12, 2002.

¹⁰⁰ Human Rights Watch interview, No. 12, Jakarta, Indonesia, April 12, 2002.

¹⁰¹ Human Rights Watch interview, No. 40, Melbourne, Australia, April 3, 2002. *See also* Human Rights Watch interview, No. 32, Mataram, Indonesia, April 19, 2002 with regard to a *refoulement* incident following from an attempt to reach UNHCR offices in Pakistan.

We were ordered to leave the country, despite the fact that we were waiting to be interviewed for resettlement by the Australian embassy in Tehran. My husband's brother who is an Australian citizen had given us family sponsorship [under Australia's Special Humanitarian Program]. But every time when the refugee numbers become too overcrowded in those countries [Iran and Pakistan], they deport back some to Afghanistan.

The police gave them fifteen days to leave the country, but Sara claims she could not gain access to the UNHCR office during that time to seek help — the staff thought she was just needlessly pestering them about the progress of their case. They avoided deportation into the hands of their Taliban persecutors¹⁰² by returning in private to Herat and hiding for a few weeks before fleeing again, this time to Pakistan. They stayed in Karachi for twenty days before deciding that it was unsafe and that they should leave the region altogether.¹⁰³ This case is a clear example of why waiting in the “queue” is not simply a matter of patience,¹⁰⁴ and how a culture of defensiveness against anxious refugees can result in a breakdown of communication between UNHCR and the very people it is supposed to protect.

Physical access to the Australian Migration Posts, like UNHCR offices, poses a problem for refugees in Iran and Pakistan. The restrictions on refugees' freedom of movement if they have no documentation prevent them from approaching the premises.

Even after applying, a refugee's chances of being resettled anywhere are slim. UNHCR is forced to establish priorities for choosing among the many who are eligible. In the past two years, UNHCR has increasingly promoted resettlement of refugees from Iran in acknowledgement of the gaps in protection existing there. Prior to 2000 they only resettled a tiny number of vulnerable cases, while in 2001 they submitted 1,500 names to resettlement countries. In 2001 Australia resettled just 625 Iraqis and 331 Afghans from Ankara, Athens, Beirut, Cairo, Islamabad, Kuala Lumpur and Tehran combined. Of these, only 236 Iraqis and 70 Afghans were referred by UNHCR.

While persons do not need to be refugees as defined in the Refugee Convention to qualify under Australia's Special Humanitarian Program, they do need to be sponsored by an Australian citizen, permanent resident or community organization. Furthermore, all applicants for resettlement must pass various elaborate character and health checks, including proving that any medical condition would not result in significant costs to the Australian community, which excludes many refugees with health problems. Their applications benefit if they are skilled or can speak English. Moreover, family reunion cases are also handled under this Special Humanitarian Program. These factors make the Special Humanitarian Program distinctly immigration-biased, rather than protection-oriented. By putting emphasis on choosing whom to invite to their territory, the Australian government is seeking its own “migration outcome” from what ought to have a humanitarian purpose.

Often extensive delays in processing resettlement cases mean that refugees with urgent protection needs have to choose between risking their lives or forgoing resettlement application procedures. A breakdown of statistics from Australian Migration Posts between July — December 2001,¹⁰⁵ for example, has revealed that, in 25 percent of cases, processing under the Refugee Program took over twenty-one months in Ankara, over twenty-two months in Beirut, over thirty-seven months in Islamabad (caused in part by disruption after September 11), and over twenty months in Tehran. In total, only seventy-three

¹⁰² See Human Rights Watch, “Humanity Denied: Systematic Violations of Women's Rights in Afghanistan,” *A Human Rights Watch Report*, vol. 13, no. 5 (C), October 2001.

¹⁰³ Human Rights Watch interview, No. 15, Mataram, Indonesia, April 15, 2002.

¹⁰⁴ DIMIA (Refugee & Humanitarian) interview with Human Rights Watch, May 2002: DIMIA was sanguine about delays in the resettlement process (“It has always taken time”), regarding it as a simple matter of patience.

¹⁰⁵ Transcripts of the Additional Estimates Hearing, Australian Senate, February 2002.

people were granted visas from these four posts during the report's six-month period.¹⁰⁶ Statistics for 1998-99 tell a similar story. Globally, a quarter of all refugee applicants had to wait over a year for processing by Australia, a quarter of all Special Humanitarian Program applicants had to wait at least one and a half years.

The system was also inefficient for women-at-risk cases. In 1998-99 only 25 percent of visas were issued within twenty-six weeks of application.¹⁰⁷ In September 2001, it was revealed that 25.4 percent of women-at-risk cases processed in Ankara and 25.7 percent of such cases processed in Islamabad had taken more than eighteen months.¹⁰⁸ While Human Rights Watch applauds Australia's generous participation in UNHCR's Women-at-Risk Program, it believes the extensive delays during the period in question all but invalidated the emergency evacuation that the program was supposed to offer.¹⁰⁹

Conclusion

To the extent that there is a resettlement "queue," it is an inaccessible and somewhat arbitrary one. It moves at such a slow pace that it can leave those waiting at serious risk. It is a system based on discretionary, non-reviewable decisions more than on predictable rights and obligations.

The system is not advertised to refugees in states such as Iran or Pakistan so that they are not given "false hope" — an approach which has some justification, given the limited number of places available. The general sense among refugees is that both UNHCR and resettlement countries such as Australia do not want resettlement to operate much more efficiently — that they deliberately maintain the system at an unattractive level of service as a way to stabilize the potentially overwhelming level of demand.

Faced with these circumstances, it is no wonder that individuals decide to take their fates into their own hands and make spontaneous secondary movements. It is often the best-informed refugees who are quickest to grasp the inefficiencies and inequities of the resettlement system and decide to bypass it, to judge from the testimonies of the more highly-educated Iraqis interviewed in Indonesia, who correctly understood that applying for resettlement would mean living without basic rights or secure protection in Iran or Jordan for at least several years.¹¹⁰

It is legitimate for individual asylum seekers to cite the inadequacies of the resettlement system as part of their explanation for the necessity of making a secondary movement. Very often it is individuals who are in extreme need of protection who invest in such hazardous travel via people-smugglers.

V. EXPERIENCES AND CHOICES DURING FLIGHT

Vulnerability at the hands of people-smugglers

The sense of powerlessness over their own destiny was overwhelming for refugees who were leaving their region of origin for the first time in their lives. For many, it was their first time on a plane or their first experience of seeing the ocean, never mind crossing it. Carrying documents in languages they could not read, knowing nothing of the laws or official practices in transit countries, and being told they could not step outside smugglers' houses or hotel rooms without risking arrest and deportation left them at the mercy of the smugglers.

¹⁰⁶ In 2001, DIMIA also proposed eliminating the possibility of making repeat applications to Australia's resettlement programs, thereby removing the only element analogous to an 'appeal' in this discretionary and highly selective system.

¹⁰⁷ DIMA Humanitarian Program: Offshore Program Delivery, Monthly Summary, June 1999.

¹⁰⁸ DIMIA statistics, September 2001.

¹⁰⁹ For an example of a Woman-at-Risk case which was not resettled by Australia in time, see "Kenya: Refugee Children Murdered at 'secure residence' in Nairobi," *Human Rights Watch Press Release*, Nairobi, April 23, 2002.

¹¹⁰ Human Rights Watch interview, No. 2, Jakarta, Indonesia, April 9, 2002.

Even those refugees who were most exploited by smugglers, regarded them mainly as unscrupulous opportunists. Refugees described their smugglers as:

- Friends or relatives acting without remuneration to assist with the first flight from the country of origin, technically not “smugglers”¹¹¹; or,
- Compatriots acting for profit, especially in Afghanistan, where smuggling of all types is the single largest source of foreign revenue;
- Fellow or former refugees, often turned to crime by the lack of legal employment for refugees in countries of first asylum and transit;¹¹² or,
- Traders in illegal migrant labor between western Indonesia and the Malay peninsula¹¹³ or other criminals with international connections and corrupt police, military and immigration officials in all Southeast Asian transit countries;¹¹⁴ and finally,
- Impoverished Indonesian fishermen hired to transport them on the last leg of their journey into Australian territorial waters.¹¹⁵

The traumatizing experiences of being smuggled compound the vulnerability of the refugees, especially women and children. One unaccompanied thirteen-year-old boy had spent over a month locked in rooms in Pakistan, Jakarta and Bali, held by smugglers with whom he shared no common language, before being loaded onto an overcrowded boat where he received little share of the food during the nine-day voyage. Seasick the whole way, he arrived at Christmas Island so dehydrated that an Australian doctor immediately put him on an intravenous drip. Despite the trauma of these experiences, this young

¹¹¹ “People-smuggling” is properly defined as the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a state of which the person is not a national or permanent resident. UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention Against Transnational Organized Crime (2000) [G.A. res. 55/25, annex III, 55 U.N. GAOR Supp. (No.49) at 65, U.N. Doc A/55/49 (Vol.I) (2001)], Article 3 – not yet in force. Under Australian law, however, no financial or other material benefit needs to be involved for “people-smuggling” to take place. Migration Act 1958, Section 233a.

¹¹² In one case, an Iranian refugee who was stranded in Indonesia without money to complete his trip was exploited by criminals threatening to hand him in as an illegal migrant if he did not cooperate with their operations. Eventually he found his own way to Australia after twenty-six days on foot through the jungle and then eighteen hours in a small boat to the Torres Strait, but he also took two fellow refugees with him in order to pay for the voyage, which makes him a “smuggler” under Australian law. Human Rights Watch interview, No. 37, Sydney, April 6, 2002.

¹¹³ There is a long tradition of trading between the Arab world and Indonesians living in Batam and the north coast of Java, of which people-smuggling is only the modern manifestation.

¹¹⁴ Several refugees interviewed by Human Rights Watch testified to the involvement of Indonesian police in smuggling activities. One Afghan man who repeatedly attempted to take boats to Australia, said that the Indonesian police were present many times, often taking bribes to overlook the fact that the refugees were being kept in hotel rooms. More actively, a police officer was sometimes paid to provide protection from arrest by others: “I myself saw that every time we wanted to go to the beach [to board a boat for Australia], in each car there was an Indonesian police officer. Once I sat next to one in the car and he fell asleep with his head on my shoulder. He joked that I should take his hat and be the policeman because he was tired of it — he said he would rather be me.” Human Rights Watch interview, No. 26, Mataram, Indonesia, April 17, 2002.

¹¹⁵ There is evidence that Indonesian traditional fishermen were forced into the people-smuggling business as insurance against the risk of having their boats burned for being caught unwittingly beyond their own fishing grounds, which have regulated and cut back more and more by Australian laws. New penalties have made even this a poor insurance strategy, however: in February 2002, an Indonesian fisherman was sentenced to eight years in prison for people-smuggling after being paid a mere A\$285 for the voyage. *See* Australian Council for Overseas Aid (ACFOA) report on Indonesian “Fishers of Men,” 2002.

boy was screened and then given his first asylum interview within forty-eight hours of arrival, during which he told Human Rights Watch that he did not feel he was treated any differently from an adult.¹¹⁶

Fatima, an Iraqi mother intercepted in Indonesia as she traveled to find her husband in Australia, was held hostage by “police or pirates” between Malaysia and Indonesia, then dumped on a remote island where she wandered through the jungle at night with her children, cutting through vines using her shoe heel, pursued by the smuggler whom she feared would rape her and who, at one point, held a knife to her child’s neck. Fatima was separated from two of her four children, who were taken off in different boats to unknown locations. It was only by the kindness of other Indonesian and Malay fishermen that the family found one another again.¹¹⁷

Smuggled refugees were, above all, terrified of drowning. Human Rights Watch interviewed one of the forty-four survivors from SIEV X, the boat that sank. The survivor, an Iraqi mother calling herself Ama, remembers counting over 400 people on board a vessel that she had been told was only going to hold 175. Among the smugglers were Indonesian policemen in uniforms and with guns, “just like that man out there,” she told Human Rights Watch, pointing out the window at a Jakarta policeman. Ama’s son was the last one on board, and she tried to yell at him not to come because of the over-crowding, but he was too far away to hear her.

Three hours before the accident, the engine began to slow down. It was at this time that we sighted dolphins following the boat. The little children were screaming with happiness because they thought the dolphins meant we were close to Australia and that they would see their fathers soon. Now I have been told by the Indonesians that those dolphins probably saved us all from being eaten by sharks when the boat sank, so they were saviors for some of us after all.

When the water rushed in, first we threw all weight off the boat and then those who could swim jumped off. I lost consciousness as the boat was sinking, and when I woke up I was trapped under the hull of the boat with children drowning all around me. I could not swim but managed to float up and then later found a floating cadaver to hold onto. I saw my son also floating in the water and kissed him goodbye. He pulled a lifejacket from a dead man and gave it to me, just before the waves separated us.

After the Indonesian fishermen rescued Ama, she talked them into going back to search for her son and they found him and a woman alive, clinging to a plank of wood. In her interview with Human Rights Watch Ama showed clear signs of trauma from this incident.¹¹⁸

Another survivor of SIEV X, a young Iraqi woman who lost her husband and two daughters in the sinking, independently confirms Ama’s statements that Indonesian police were present when the boat was being loaded, adding that these officers later threatened the survivors not to say anything to journalists about their presence. Her own daughters, aged five and six, were trampled in the crush to escape from the boat’s sinking hull and she let go of first one child’s hand and then the other’s once she realized they were dead. After the boat sank, she briefly spotted her husband in the sea before he was washed away. She was five months pregnant at the time. In April 2002, when Human Rights Watch interviewed her, she was alone in Jakarta with her newborn baby, anxiously awaiting resettlement.¹¹⁹

¹¹⁶ “It was very intense because I had to prove my identity and nationality. They asked me about food and customs in my region, including marriage and economics – things I couldn’t know or had never seen because of my age.” Human Rights Watch interview No.41, Sydney, April 21, 2002.

¹¹⁷ For a full transcript of this interview, see www.hrw.org/refugees. Human Rights Watch interview, No. 6, Cisawa, Indonesia, April 11, 2002.

¹¹⁸ Human Rights Watch Interview No.11, Jakarta, Indonesia, April 12, 2002.

¹¹⁹ Human Rights Watch Interview No.12, Jakarta, Indonesia, April 12, 2002.

Choice of route and destination

In 2000-01 other countries with asylum procedures and social settlement systems broadly comparable to Australia's experienced comparable increases in people arriving from countries in the Middle East and South Asia where refugee protection conditions were deteriorating.¹²⁰ A range of countries less developed than Australia from Ghana to Kyrgyzstan to Nepal where Afghan, Iraqi and Iranian refugees could flee have asylum procedures that afforded them formal protection, and a great many refugees do make long-distance secondary movements to non-western countries: there is a large Afghan refugee population living in New Delhi, for example, and an Angolan refugee population in Brazil. It cannot be said that either asylum seekers or smugglers single out Australia simply for the sake of acquiring a better standard of living.

Asked why they had hoped to reach Australia, refugees interviewed by Human Rights Watch gave various responses:

- The decision was taken out of their hands by smugglers;
- They had intended to reach any country that would grant them a secure legal status as a refugee and, of such countries, Australia was the cheapest to reach;
- They had faith in Australia as a country that would respect their human rights; or
- Having been forced to flee their homes, they headed for the only country outside their homeland where they had a family member.

The attraction of an affluent economy and better standard of living, while acknowledged, was never the refugees' primary motive for secondary movement.

The smuggler's decision

Traveling outside one's immediate region is expensive, regardless of the destination.¹²¹ Because refugees tend to put themselves into heavy debt to smugglers, they need to go to a relatively prosperous country to work off the debt within the required time period. Failure to pay up may have serious repercussions for relatives back home. In this sense, the fact that refugees use smugglers does determine their need to reach an affluent country.

A surprising number of asylum seekers interviewed by Human Rights Watch were never told where they were being taken. One young man with little knowledge of geography thought he was going to London until he learned otherwise when he found himself on an Indonesian boat. One seventeen year old Pashtun boy named Akif was sent away by his mother after his father, who worked for a British agricultural development agency, was assassinated in Kabul. Smugglers promised him they would get him to Australia by legal means, but Akif realized this was a lie when he was forced to overstay his tourist visa in Malaysia. At this point, however, it was too late to go home.¹²²

Seeking a legal status

Most refugees interviewed by Human Rights Watch had only asked the smugglers that they be taken to a country that would give them a secure legal status,¹²³ which they lacked in their first countries of

¹²⁰ During January-April 2001, Iraq and then Afghanistan generated the highest numbers of asylum seekers in industrialized countries. In the E.U., for example, Iraqi applications increased to 40,577 in 2001 from 14,806 in 1995 and Afghan applications to 38,620 in 2001 from 11,166 in 1995. These were the only major countries of origin to show such sizable increases since the early 1990s. In the third quarter of 2001, Europe as a whole had a 20 percent increase in asylum seekers, with the largest single group from Afghanistan. It had a 34 percent increase in the number of Iraqi asylum seekers in the same quarter, many of whom were secondary movers who had previously sought asylum in Iran, Turkey or central Asia. UNHCR, "Refugees by Numbers," 2001.

¹²¹ One Afghan man with five children had had to pay US\$22,000 to smuggle his family as far as Jakarta in 2001. Human Rights Watch interview No.33, Mataram, Indonesia, April 20, 2002.

¹²² Human Rights Watch interview, No. 23, Mataram, Indonesia, April 18, 2002.

¹²³ See, for e.g., Human Rights Watch interviews, Nos. 1, 5, 17, 18 and 19.

asylum. They had heard of only a few western countries that offered asylum to people from any region of the world and as well as permanent residence permits to refugees unable to return to their homes anytime in the foreseeable future. When interviewees referred to wanting to reach “any country which accepts refugees”¹²⁴ or a “safe country”¹²⁵ these two things were what they primarily had in mind. From their perspective, a country where UNHCR is operating but where the government remains hostile to refugees’ presence and may insist on their resettlement, does not qualify as “accepting” of refugees.¹²⁶ One father of a large Afghan family said he would willingly go “anywhere in the whole world where my children could go to school and have a legal status.”¹²⁷

At least 80 percent of all Middle Eastern asylum seekers to Australia pass through Malaysia,¹²⁸ because that country grants visa-free entry to all nationals of Islamic countries (though after September 11, 2001, some are required to have a letter of introduction). They are automatically granted a short-term visitor’s visa upon arrival at Kuala Lumpur airport. Refugees interviewed in Indonesia and Australia said that, if they wanted to get out of the Middle East, Malaysia was the cheapest destination with such a visa policy that could be reached by air. From there, the low-cost, high-risk options for the final legs of the journey to Australia are small, rickety boats. Any other route — to Europe or North America, for example — requires more forged documentation to pass through central Europe or Central America. That is not only much more expensive but also more time-consuming while these documents are prepared or obtained.¹²⁹ One Afghan woman told Human Rights Watch that she had a sister in San Francisco and a brother in Germany, but that she, her husband, mother, and four-year-old daughter had headed for Australia, where they had no relations, because it was several thousand dollars cheaper, allowing them to keep the family group together. Now she and her family are waiting for refugee determination in Indonesia and if recognized would be willing to go “anywhere in the world that would give us documents to work and to travel. Then we could visit our relatives, even if we could not live in the same country.”¹³⁰

Australia’s reputation for respect of human rights

Refugees commonly cited Australia’s historical credentials and global reputation as a leading defender of human rights, which recent refugee policy may be rapidly eliminating. They frequently mentioned Australia’s democratic government and its civil and political freedoms, and one young Afghan widow could not grasp why Australia might allow her to come as part of a women-at-risk resettlement program¹³¹ but not if she traveled to Australia at her own expense: “I knew nothing about Australia except its name, and I was told that they were people who supported human rights and would take care of a woman refugee who was alone,” she told Human Rights Watch.¹³² Sometimes refugees see Australia as a

¹²⁴ One Hazara man who fled to Pakistan in 1998 and who had personally experienced too much *refoulement* and other failures of local protection to stay in the region, first decided to go to England via Turkey, Greece and Italy because he had heard that many Afghans were granted asylum there. While making plans, however, he heard that some Afghan friends were mistaken for Kurds and killed while trying to transit Turkey, so he paid a smuggler US\$5000 to fly him to Jakarta and take him from there to a country where, as the smuggler put it, “you will never have to feel unsafe or fear return to Afghanistan.” Human Rights Watch interview, No. 40, Melbourne, Australia, April 3, 2002.

¹²⁵ See, for e.g., Human Rights Watch interview No. 39, Melbourne, Australia, April 3, 2002.

¹²⁶ See also Statement from Woomera detainees to the media in July 2002 that they would rather be sent to “any third world country which would accept us” rather than stay in detention in Australia.

¹²⁷ Human Rights Watch interview, No. 33, Mataram, Indonesia, April 20, 2002.

¹²⁸ See Alan Dupont, *Refugee and illegal migrants in the Asia-Pacific region* (Canberra ANU, 2002), p.13.

¹²⁹ See, for e.g., Human Rights Watch interviews Nos. 4, 5, 20, 22 and 29.

¹³⁰ Human Rights Watch interview, No. 15, Mataram, Indonesia, April 15, 2002.

¹³¹ Women-at-Risk Programs are resettlement programs for refugee women without the protection of a male relative and at risk of victimization, harassment or serious (often sexual) abuse because of their gender. Australia has one such Program.

¹³² Human Rights Watch interview, No. 13, Mataram, Indonesia, April 15, 2002.

haven from civil strife. One Afghan boy said he had picked Australia because he saw on the map that “they have all one country with no borders inside the middle, so there would be no wars.”¹³³

Family Reunification

Family ties were also factored into the decisions of many refugees to go to Australia. Many of those interviewed by Human Rights Watch had members of their immediate family¹³⁴ in Australia or their only relative outside their home country lived in Australia. Women whose husbands had already been recognized as refugees in Australia, but who were denied the right of family reunification felt they had no other option than to try to join them on their own accord. This necessitated leaving the country to which they had first fled in an “unauthorized” manner.

Human Rights Watch met one Iraqi refugee in Indonesia who had already spent two and half years in Australia, where he had been recognized as a refugee, but was so frustrated at delays in reuniting with his wife that he traveled back to Jakarta in order to help her enter Australia illegally. The couple were on board a boat that was intercepted and returned to Indonesia, so they now have to start from scratch and file a new asylum application under the wife’s name and hope for resettlement to another country such as New Zealand or the United States.¹³⁵

VI. WHY REFUGEES DO NOT REMAIN IN TRANSIT COUNTRIES

The Australian government argues that refugees compelled to leave their region of origin should and could have sought protection or applied for resettlement at a UNHCR office in a Southeast Asian country such as Malaysia or Indonesia. The fact that they did not wish to remain in these countries in question, either for the full duration of their exile or for the duration of their resettlement processing, is presented as evidence that they were economically motivated and are therefore less deserving of settlement in Australia. Human Rights Watch, however, found that effective protection was not readily available in these Southeast Asian countries during 2000 and early 2001, the period in which most of those intercepted by Australia were in transit.

Access to protection in Malaysia

Malaysia has not signed the Refugee Convention and there is no provision in its domestic law for refugees from Iraq, Iran or Afghanistan to remain in the country.¹³⁶ Anyone found harboring illegal immigrants faces up to five years in jail, or a RM10,000 fine.¹³⁷ Refugees arrested for overstaying a visitor’s visa face detention and summary return, possibly resulting in *refoulement*. Refugees recognized by UNHCR but not by the Malaysian government are not protected by Malaysia and are not allowed to integrate locally.

Access to resettlement from Malaysia

During 2000 and early 2001, when the refugees intercepted by Australia were in transit, UNHCR in Kuala Lumpur, Malaysia had a small office with chronic staff shortages, so that only one or two officers were doing refugee status determinations and reviewing one another’s work if a refugee appealed a

¹³³ Human Rights Watch interview, No. 33, Mataram, Indonesia, April 20, 2002.

¹³⁴ In Australian law, “immediate family” means a husband, wife, dependent child or dependent parent. See DIMIA Form 842.

¹³⁵ Human Rights Watch interview, No. 10, Cisawa, Indonesia, April 11, 2002.

¹³⁶ See Human Rights Watch, “Living in Limbo,” *A Human Rights Watch Report*, 2000, p.25-6.

¹³⁷ Under new, hard-line laws effective in August 2002, the penalty will be a mandatory six months in jail and/or receiving six strokes of a cane. “Stop harbouring illegals, dept warns Sarawakians,” *The Malaysian Star*, July 18, 2002.

rejection.¹³⁸ The office was located on a hill near the national palace, with heavily policed streets so that, if the refugees' documents were not in order, they risked arrest by the Malaysian police trying to reach the office.¹³⁹ One Afghan man arrested as an illegal immigrant claims to have been kicked and punched before being thrown into a Malaysian jail alongside a fellow Afghan who had been so badly beaten that his head was bleeding profusely and the police had to take him to hospital.¹⁴⁰ During 2000 Human Rights Watch researchers in Malaysia spoke to asylum seekers who said they did not go to UNHCR because they knew of people who had been arrested in the attempt, and because, as they put it, "everyone gets rejected" anyway.¹⁴¹ In fact, 250 refugees were recognized by UNHCR Malaysia during 2001, and seventy-one were resettled to other countries, but many asylum seekers interviewed by Human Rights Watch in Indonesia claimed that they had been unaware of UNHCR's presence in Malaysia¹⁴² or even what country they were transiting.¹⁴³ The majority had had no opportunity to contact UNHCR because they were met on arrival at Kuala Lumpur airport by a smuggler who did not let them go outdoors until the time came to transport them to Indonesia. Misinformation from smugglers therefore played as important a role as objective obstacles to accessing the UNHCR "queue."

Access to protection in Indonesia

The situation for asylum seekers and refugees in Indonesia has improved over time since late 2001, as described in a subsequent section of this report; this section is intended only to describe the conditions prevailing during 2000-2001 when refugees intercepted by Australia were transiting through Indonesia.

Indonesia is not a signatory to the Refugee Convention and the Indonesian Immigration Act makes no provision for the legal entry or residence of refugees.¹⁴⁴ As a result, all unlawfully present foreigners detected in Indonesia are subject to "quarantine detention," pending deportation.¹⁴⁵ Indefinite administrative detention of illegal migrants, including refugees, in a prison, police station or special "quarantine" or "immigration center" was common practice in Indonesia during 2000-early 2001, especially for individuals arriving in Jakarta. While the Indonesian authorities tolerated some groups of illegal migrants who participated in the informal economy, Afghan and Iraqi refugees were not overlooked in this way.

In 2000, at the beginning of its operations in Indonesia, the International Organization for Migration (IOM) could do little more than bring food to those detained under Indonesian law and notify UNHCR about those who said they were refugees. Human Rights Watch collected three corroborating testimonies from refugees who alleged that in one case IOM did not perform its role in this way. The refugees stated that they were in the town of Senggigi on the island of Lombok in February 2000, being kept in a hotel by a smuggler along with two others, when a man who introduced himself as an Australian official came to

¹³⁸ See Human Rights Watch, "Living in Limbo," 2000, pp.49-50. Between August 1999 and April or May 1990 there were only two UNHCR officers doing refugee status determinations in Kuala Lumpur. As of July 2000, there was only one officer, so appeals were sent for review to Jakarta.

¹³⁹ Where UNHCR is made aware of such an arrest, it has generally been able to intervene promptly to secure the person's release, and UNHCR emphasizes that many asylum seekers do approach the office without being detained or hindered in any way. Circumstances have also improved since the intercepted refugees were in transit through Malaysia during 1999-2001. UNHCR letter to Human Rights Watch, received November 20, 2002.

¹⁴⁰ Human Rights Watch interview, No. 29, Mataram, Indonesia, April 18, 2002.

¹⁴¹ See Human Rights Watch, "Living in Limbo," 2000, p.49. Note that the total number of cases resettled from Malaysia during the first nine months of 2001 was seventy-one. See UNHCR Global Refugee Trends, Table 11.

¹⁴² Human Rights Watch interview, No. 2, Jakarta, Indonesia, April 9, 2002.

¹⁴³ This was credible testimony since it came from an illiterate Afghan woman from a rural village, who put herself entirely into the hands of the smugglers. Human Rights Watch interview, No.17, Mataram, Indonesia, April 15, 2002.

¹⁴⁴ Indonesian Immigration Act No.9/1992, Sections 8 & 24 define who is permitted and refused lawful entry to Indonesia and clearly make no provision for a protection visa or any other form of international asylum.

¹⁴⁵ Indonesian Immigration Act No.9/1992, Sections 1 (15) & (16), & Section 44.

the hotel with the Indonesian police.¹⁴⁶ He stayed until midnight trying to persuade the Iraqi refugees to return to Iran. “He gave us information about the sinking in the sea, persuading and frightening us, and told us that ‘We will return you to Indonesia even if you reach Australia’...” He also took many photographs of them. When the five Iraqi men said they could not safely return to Iran, the Australian escorted them to the local jail, where they spent twelve days in a room with a leaking roof, no mattress, and little food. They had no way to inform anyone of their whereabouts. One of the refugees was particularly shaken as he said it reminded him of the prison cell in which he was arbitrarily detained in Iraq. After eight days, an IOM representative finally came:

He told us it was our own fault that we were there, for entering Indonesia illegally. He told us we had to either return, with his assistance, to Iran or Iraq, or go to court and get a criminal charge for illegal entry. If we could not pay the fine, the IOM man told us that we would have to remain in the prison and serve a sentence. We were desperate because we had no money left to pay any fine, and because we knew our lives would be at risk if we were returned to Iraq. We did not believe that Iran would accept us back either, since we had signed papers when we left promising we would never return.

According to the three testimonies, at no point during this one hour of heated conversation in broken English did the IOM representative mention UNHCR or the right to seek asylum. He changed his attitude only when they said to the IOM representative, “You say you work for a humanitarian organization. If that is the case why don’t you help us pay our fine with that same money which you would use to return us?” He left saying he would attend their court hearing. There were no other witnesses to this conversation except for an Indonesian guard who did not speak English. Later, by chance, their smuggler got into a fight and was detained in the same prison. When the smuggler’s contacts bailed him out, he promised to come back soon and bail the five Iraqis out. That is how they were released.¹⁴⁷ IOM Jakarta strongly denies this story, stating that no IOM representative was even posted or present in Lombok during February 2000. There is confirmation, however, of the presence of an IOM representative at another interception incident in Sengiggi, alongside UNHCR, in mid-March 2000, just a few weeks earlier.¹⁴⁸

Others interviewed spoke of the appalling conditions in “quarantine” detention when they were trying to transit Indonesia during 2000. One Hazara family, including two children aged two and four, spent three months in a two-meter by two-meter cell in a detention center based near Jakarta, where each day they received only a cup of water and a dirty fistful of rice, containing ants and rat feces. They were locked in the cell for twelve hours a day and allowed outdoors for just two hours a week. IOM did not visit them and their only way to contact the outside world was to bribe the guards. The father repeatedly paid bribes to send faxes to UNHCR officials, who came to see them after two weeks. UNHCR asked him to fill out the form to claim asylum and then a full two months later returned to interview him. By this time his health had deteriorated and he spent most of his asylum interview just begging for release.¹⁴⁹ In September 2000, after seventy more refugees were placed in the center, UNHCR interventions resulted in an improvement in conditions, with cells unlocked and less restricted movement. Many asylum seekers

¹⁴⁶ The Australian Senate Select Committee on A Certain Maritime Incident has recently recommended that “a full independent inquiry into the disruption activity that occurred prior to the departure from Indonesia of refugee vessels be undertaken...” Australia Senate Select Committee, *Report on a Certain Maritime Incident*, October 2002 (Henceforth: CMI Report), p.xx. The Australian officer’s activities described here were presumably some part of that disruption operation.

¹⁴⁷ Human Rights Watch interview No.2, Jakarta, Indonesia, April 9, 2002, and independently confirmed by Human Rights Watch interview No.3, Jakarta, Indonesia, April 9, 2002 and Human Rights Watch interview No.7, Cisawa, Indonesia, April 11, 2002.

¹⁴⁸ The refugees were able to identify the IOM staff member in Jakarta whom they met in the prison, but asked for the name to be withheld because IOM was still involved with arranging their resettlement to other countries.

¹⁴⁹ Human Rights Watch interview No.5, Cisawa, Indonesia, April 10, 2002.

therefore left the detention center and tried to go to Jakarta. UNHCR urged them to return rather than face harsher treatment elsewhere, and intervened with authorities to prevent their re-arrest. This particular Hazara family, however, said that they had felt coerced by UNHCR and IOM into returning to the detention center and chose instead to live on the charity of other Afghans in Cisawa.¹⁵⁰

In May 2001, while taking the bus in Lombok, Habib and his family were arrested as illegal migrants, along with a large group of refugees. The Indonesian police moved seven of the men, including Habib, to the Mataram police station where they remained for twenty days. They were all put in one room, where water was leaking on them and where they slept on pieces of wet wood. The room had a window with an iron net through which they could speak to their families, but they were never allowed out. IOM had been informed about the detention of the group and was supplying the police with food to pass to them, but the police did not notify IOM that these seven men were being held in the prison. The imprisoned men were denied access to phones or to anyone but their families. No one informed them of the rules or their rights and they had no idea how long they would be detained. The wives and children of the men were housed in the local mosque, where they had to sleep on the floor.

After twenty days, one of the seven men escaped and called IOM. A representative came to visit them the next day. At this point they were all released and stayed in an unused hotel until UNHCR arrived a month later to conduct asylum interviews. By then those with money had disappeared with smugglers. The two families with no money left, including Habib's, still there when UNHCR arrived.¹⁵¹

Such testimonies demonstrate that in the years when refugees were deciding whether or not to make secondary movements from Southeast Asia to Australia, UNHCR and IOM had extremely limited ability to either protect or assist those who claimed asylum after being arrested as "irregular migrants" in Indonesia. The Indonesian authorities clearly did not distinguish between persons in need of international protection and other illegal migrants, and refugees were constantly at risk of detention.

Access to resettlement from Indonesia

Asylum seekers were unable or too afraid to make contact with UNHCR immediately upon arrival in Indonesia. One Hazara boy who had never left Afghanistan before he traveled via Iran and Pakistan to Malaysia, said that he stayed for three days in Kuala Lumpur, then took a boat and a five-hour car trip under smugglers' escort to Medan in Indonesia, where he stayed for one day. "The smuggler told us to stay hidden. We didn't know the rules or regulations of this country, and were too afraid of being arrested to disobey. The smuggler told us we could be thrown in jail for up to five years for being illegal immigrants." All that he did know was that Indonesia "did not accept refugees."¹⁵² Another Afghan man, when asked why he didn't try to contact UNHCR in Indonesia in between his many failed attempts to reach Australia by sea, replied:

At the beginning I had never heard of their system. The smugglers kept us away from such information. We were told that the U.N. would make problems for us, so I never really understood about their role until I sat in my interview [after being forced back to Indonesia by the Australian navy]. I had no contact with any asylum seekers registered with UNHCR during those months when I was trying to take the boats.¹⁵³

Other asylum seekers testified that they did not try to contact UNHCR Jakarta because they assumed it would be as slow as in Iran or Pakistan or because the smugglers told them that UNHCR "was not

¹⁵⁰ Human Rights Watch interview No.5, Cisawa, Indonesia, April 10, 2002.

¹⁵¹ Human Rights Watch interview, No. 33, Mataram, Indonesia, April 20, 2002.

¹⁵² Human Rights Watch interview, No. 18, Mataram, Indonesia, April 16, 2002.

¹⁵³ Human Rights Watch interview, No. 26, Mataram, Indonesia, April 17, 2002.

accepting any more people.”¹⁵⁴ One Iraqi, already disillusioned after the UNHCR office in Tehran had told his friends, sent to inquire on his behalf, that they “could not help him,” remembers being told by other Iraqis he met in Jakarta that the UNHCR office there was “inactive.”¹⁵⁵ Another Iraqi family explained that at the beginning they had only spent one day in Jakarta under the constant supervision of a smuggler who would never have let them contact UNHCR. Later, living in Cisawa while awaiting a boat to Australia, they learned that resettlement processing could take two or three years and they met with Iraqi refugees who had been rejected by UNHCR, who said they had no future in Indonesia, no hope of return in safety to Iraq, and now believed themselves to be branded as rejected cases if they sought asylum elsewhere.¹⁵⁶ Between January 1999 and August 2001, UNHCR Jakarta recognized 476 refugees; just 18 were resettled, due to a lack of response to UNHCR referrals from resettlement countries.

Two asylum seekers interviewed in Indonesia said that their original intention had been to travel only as far as Jakarta and apply for resettlement from there, but one was physically prevented from doing so by her smuggler who wanted to deliver her to Australia, where he expected to receive the final installment of his payment from a family friend of hers,¹⁵⁷ and the other was dissuaded by a friend who had arrived earlier in Jakarta and told him that it seemed a “fake process.” This man complained, “At least in Tehran UNHCR had told us honestly ‘We can do nothing’ when we went to their offices. In Jakarta it is similar but they are not so truthful about it.”¹⁵⁸ As another refugee put it, “We had lost confidence. We were just prisoners in the hands of the smugglers once we were outside our part of the world.”¹⁵⁹

Conclusion

In summary, the main protection problems faced by refugees in Southeast Asian transit countries during 2000 and early 2001 were the risk of arbitrary detention, ill-treatment and deportation as “illegal migrants,” exploitation and misinformation by smugglers, and difficulties in accessing the UNHCR determination and resettlement system. Lack of trust in the justice and efficiency of UNHCR procedures also caused many refugees, who obviously would have preferred to forgo the dangers and financial costs of illegal travel, to continue their journey toward Australia.

VII. MEASURES USED BY AUSTRALIA TO DETER “UNINVITED” REFUGEES

Introduction: deterrents and penalties

The Australian government penalizes asylum seekers who arrive uninvited — that is, those who make spontaneous secondary movements. The measures they take to penalize them are also intended to deter future arrivals. They include interception and forcible return to Indonesia; interception and transfer to detention in the Pacific nations of Nauru and Papua New Guinea; mandatory detention within Australia; and temporary protection visas, with restrictions on the rights afforded recipients.

Deterrents

Those who have designed Australian asylum policy are unapologetic about sending “messages down the pipeline” — measures to deter refugees who may contemplate unauthorized secondary movements or people-smugglers thinking about opening up a new route to Australia. Minister for Immigration Philip Ruddock has stated that “[d]etention is not punitive nor meant as a deterrent.”¹⁶⁰ At the same time,

¹⁵⁴ Human Rights Watch interview, No. 12, Jakarta, Indonesia, April 12, 2002.

¹⁵⁵ Human Rights Watch interview, No. 3, Jakarta, Indonesia, April 9, 2002.

¹⁵⁶ Human Rights Watch interview, No. 8, Cisawa, Indonesia, April 11, 2002.

¹⁵⁷ Human Rights Watch interview, No. 16, Mataram, Indonesia, April 15, 2002.

¹⁵⁸ Human Rights Watch interview, No. 28, Mataram, Indonesia, April 18, 2002.

¹⁵⁹ Human Rights Watch interview, No. 40, Melbourne, Australia, April 3, 2002.

¹⁶⁰ Australian Minister for Immigration, Philip Ruddock, to the Australian Anglican Synod, July 27, 2001.

however, he has applauded the 2001 package of legislation because “[t]his strategy has been successful in deterring potential illegal immigrants from making their way to Australia.”¹⁶¹

The use of detention as a deterrent is not permitted by the UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers,¹⁶² nor by Excom Conclusion No. 44.¹⁶³ Therefore the Department of Immigration (DIMIA) has recently become circumspect, referring instead to “disincentives” which should only “encourage people to apply at the earliest possible stage” — that is, through Australia’s overseas resettlement programs.¹⁶⁴

Penalties

Article 31(1) of the 1951 Refugee Convention states:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.¹⁶⁵

Whereas some governments contend that the term “penalties” refers only to criminal sanctions, such as prosecution, fine or imprisonment, UNHCR’s Division of International Protection defines the term as “any unnecessary limitation to the full enjoyment of rights granted to refugees under international refugee law.”¹⁶⁶ By this UNHCR interpretation, several of these so-called disincentives imposed by Australia do amount to codified penalties, though the Australian government would disagree: “It’s not about punishment of the individual. That’s a complete misrepresentation,” DIMIA told Human Rights Watch.¹⁶⁷

The terms “coming directly” and “good cause” in Article 31 define who may and may not be penalized. UNHCR¹⁶⁸ and most states accept that “coming directly” may involve transit through other countries, so long as the time spent there was no longer than the time required for mere transit and so long as those other states were unwilling or unable to provide asylum to the refugee.¹⁶⁹ The phrase “coming directly” should never be interpreted in relation to a set time period spent in transit but should be

¹⁶¹ Australian Minister for Immigration, Philip Ruddock, to the Australian Parliament, February 19, 2002, quoted in Fr Frank Brennan SJ, “Australia’s Refugee Policy – Facts, Needs and Limits,” 2002, p.9-10.

¹⁶² February 1999.

¹⁶³ UNHCR Excom Conclusion No. 44 (XXXVII) – 1986.

¹⁶⁴ See DIMIA, “Principled Observance of Protection Obligations and Purposeful Action to Fight People Smuggling and Organized Crime: Australia’s Commitment” which uses the term “disincentives.”

¹⁶⁵ Article 31(2) then goes on to prohibit Contracting States from imposing restrictions on the free movement of such refugees. There is also a suggestion in Article 31(2) that the asylum seekers themselves should be the ones to obtain their own admission into another country of asylum: “The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.”

¹⁶⁶ UNHCR Division of International Protection internal memo, May 2002, quoted in: Guy S. Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection,” UNHCR Global Consultations, October 2001, p.9.

¹⁶⁷ Human Rights Watch interview with DIMIA, May 2002.

¹⁶⁸ UNHCR, “Guidelines and Applicable Criteria and Standards relating to the Detention of Asylum Seekers,” February 1999, para 4.

¹⁶⁹ The *travaux préparatoires* of the Refugee Convention show the “come directly” phrase to have been only a last minute adjustment proposed by the French delegation, which feared that the refugees in Belgium and other neighboring countries would head their direction. Yet the choice of “a territory” rather than the refugee’s country of origin was a deliberate acknowledgement of the problems many refugees might face finding effective protection in first countries of asylum – the situation of Poles in Czechoslovakia was mentioned during the negotiations, by way of example. [Guy S. Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection,” UNHCR Global Consultations, October 2001, p.4].

understood as referring to the general urgency with which individual refugees move onward as soon as they become imperiled at any stage of their exile. The primary purpose of Article 31 is to prevent the imposition of penalties, not to prohibit secondary movement.¹⁷⁰

Interceptions at sea

When Australia prevents vessels transporting asylum seekers from reaching its shores it engages in interception.¹⁷¹ A number of countries practice interception at sea, but Australia has set a dangerous precedent in terms of how they are conducted and resolved.¹⁷²

International maritime law obliges ships' masters to rescue all distressed individuals they encounter at sea.¹⁷³ Persons rescued by a private vessel are typically taken to its next port of call, where any asylum seekers are supposed to have access to fair and efficient refugee status determination procedures and to be protected against *refoulement*.¹⁷⁴ When a state's agents perform the interception,¹⁷⁵ that state's protection obligations are invoked because the obligation of *non-refoulement* applies just as it would when those wishing to seek asylum enter a state's territorial waters.¹⁷⁶ Preventing entry of asylum seekers at sea, without granting them access to fair procedures to identify and protect those facing threats to their life or freedom as a direct or indirect result of being denied entry, may constitute "rejection at the frontier."¹⁷⁷ Numerous UNHCR Executive Committee Conclusions condemn that practice.¹⁷⁸ Moreover, "the identification and subsequent processing of asylum-seekers is an activity most appropriately carried out on dry land," as access to translators, attorneys and appeal mechanisms is limited on board vessels.¹⁷⁹

¹⁷⁰ See R. Byrne and A. Shacknove, "The Safe Third Country Notion in European Asylum Law", *Harvard Human Rights Journal*, 9 (1996).

¹⁷¹ See note 34 for definition of "interception."

¹⁷² For examples of post-Tampa interception policies by other countries, see "Not For Export: Why the International Community Should Reject Australia's Refugee Policies," *A Human Rights Watch Briefing Paper*, September 2002.

¹⁷³ See, e.g., UNHCR, "Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea," para. 4 (citing the United Nations Convention on the Law of the Sea of 1982 ("UNCLOS"), the International Convention on Maritime Search and Rescue of 1979 ("SAR") and the International Convention for the Safety of Life at Sea of 1974 ("SOLAS")).

¹⁷⁴ See, e.g., UNHCR Excom Conclusion No. 15 (XXX) - 1979, para. c ("It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum."); UNHCR Excom Conclusion No. 23 (XXXII) - 1981, para. 3 ("persons rescued at sea should normally be disembarked at the next port of call").

¹⁷⁵ UNHCR Excom Conclusion No. 23 (XXXII) - 1981, para. 23; see also UNHCR, "Incorporating Refugee Protection Safeguards Into Interception Measures," Ottawa, Ontario, May 14-15, 2001, para. 10 ("in the context of interception measures, the principle of non-refoulement must be fully respected, and effective safeguards to ensure this should be developed").

¹⁷⁶ Australian territorial waters: twelve nautical miles from the low water mark of Australian shores. Technically, Australian waters also means: (a) in relation to a resources installation—waters above the Australian seabed; and (b) in relation to a sea installation — waters comprising all of the adjacent areas and the coastal area. See Migration Act 1958 — Section 5.

¹⁷⁷ While UNHCR does not fundamentally disapprove of interception, it has stressed the need "to ensure, through the adoption of appropriate procedures and safeguards, that the application of interception measures will not obstruct the ability of asylum-seekers and refugees to benefit from international protection." UNHCR, "Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach," para. 35. The development of "Guidelines on Safeguards for Interception Measures" forms part of the Agenda for Protection endorsed by the UNHCR Executive Committee in October 2002.

¹⁷⁸ See e.g. UNHCR Excom Conclusion No. 82 para (d)(iii), and those Conclusions relating to asylum seekers at sea and rescue at sea, such as Nos. 14, 15, 23, 26 and 38.

¹⁷⁹ UNHCR, "Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea," March 18, 2002, para. 23.

UNHCR Excom Conclusion No.30 further recommends that an asylum seeker “should be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory.”¹⁸⁰

Two Indonesian boats, “suspected illegal entry vessels” — “SIEV 5” and “SIEV 7,” were intercepted and boarded by the Australian navy in October 2001, then escorted into Australian territorial waters and held in the lagoon at Ashmore Island for nearly seven days.¹⁸¹ Both boats and their asylum-seeking passengers were subsequently returned to Indonesian waters, using force and deception. Human Rights Watch interviewed passengers from each of these boats to document whether the asylum seekers’ rights were respected during the interceptions.¹⁸²

Unnecessary use of force aboard “SIEV 5”

The Australian navy intercepted SIEV 5 with 239 passengers on October 3-4, 2001. Asylum seekers who were on board state that both adults and children were detained for seven days under the open sky in overcrowded conditions and denied adequate medical treatment, food, and water during the entire period. One woman gave birth behind a screen of cardboard boxes. “At first I was patient but then I laid the baby at the feet of the Australian soldier and tried to show him that my wife was bleeding badly,” said Agha, the father of a newborn baby. Even though doctors recommended that she be taken to a mainland hospital to treat her severe uterine bleeding, Agha alleged, she was never evacuated in accordance with the recommendation. She still suffers gynecological complications today as a result of not receiving proper emergency treatment at that time.¹⁸³

After these seven days of detention, the family groups from SIEV 5 were transferred to the HMAS Warramunga, an Australian navy ship, which then escorted the fishing boat containing the single men back toward the Indonesian island of Roti. The asylum seekers told Human Rights Watch that the single men were detained in the lower cabin of the fishing boat for two days, in excessively cramped conditions and without adequate ventilation.¹⁸⁴

The families who were on HMAS Warramunga, meanwhile, told Human Rights Watch how they were forcibly put back on the fishing vessel after the Australians had taken them to the edge of Indonesian waters. Upon hearing the announcement that they had been returned, there was hysterical grief on the part of the asylum seekers, at which point Australian soldiers wearing helmets and carrying batons rushed into the families (some sixty or seventy people including young children and babies) where they stood in the penned area on the deck of the navy ship. “One man in the front row said: ‘You can kill us, but we cannot go back.’ He was beaten until he was unconscious.” The soldiers grabbed each person by both arms and forced them from the ship into the speedboat, which would take them back to their fishing boat.¹⁸⁵ Human Rights Watch also interviewed the wife of this beaten man, a Tajik refugee from Afghanistan named Aziza. She described the scene in greater detail: “We tried to put our babies at the soldier’s feet and begged them to have mercy on the children: ‘Where are the rights of the children?’ I asked in Persian, and a man translated that question for me.” When they saw that their pleas were having no effect, her husband

¹⁸⁰ UNHCR Excom Conclusion No.30 (XXXIV) - 1983. *See also*: UNHCR Excom Conclusion No.8 (XXVIII) - 1977 and Conclusion No.15 (XXX) - 1979 which both recommend that there should be a clearly identified central authority responsible for examining requests for refugee status and that a frontier authority should not reject an asylum seeker without reference to that central authority.

¹⁸¹ DIMIA Factsheet No.76; and DIMIA testimony at the Australian Senate Inquiry into a Certain Maritime Incident, 470ff.

¹⁸² In addition, a further two vessels carrying c.146 people were returned to Indonesia in December (these people were not interviewed by Human Rights Watch) and other asylum seekers who were intercepted were transferred to the Pacific sites.

¹⁸³ Human Rights Watch, No.19, Mataram, Indonesia, April 16, 2002, and corroborated by: No. 22, Mataram Indonesia, April 18, 2002.

¹⁸⁴ Human Rights Watch interview, No.29, Mataram, Indonesia, April 18, 2002.

¹⁸⁵ Human Rights Watch interview No.15, Mataram, Indonesia, April 15, 2002.

moved forward to try to pick up his child, but his sudden movement alarmed the soldiers, who pinned him down on his back on the floor. The baby was left clinging to his chest.

They had iron military badges on their shoulders, and one man touched it with his stick to show the electric sparks. Then they beat the sides and ribs of my husband with the electric sticks until he was unconscious. He was hit at least four times. The baby held onto his neck throughout this beating. I thought he had died, and when they moved away from his motionless body I rushed forward to rescue the baby.

Aziza told Human Rights Watch that two Australian soldiers also attacked her at this point, each striking her once with electric batons on both sides of her body, under her arms. This made her collapse and let go of the baby. They then picked up the baby and “threw” it down into the speedboat, and then “like a dead body, they threw me down too. I fell on top of my baby. The baby was not injured, but I was badly bruised on my arms and legs. Where they had hit me, there were bruises that felt hot. The pain from those strokes got worse a little later, and I continued to feel pain in those spots for nearly a month afterwards.”¹⁸⁶ In view of the limited threat posed by the unarmed refugees, particularly the women and children, Human Rights Watch concludes that they were subjected to disproportionate use of force.¹⁸⁷

Finally, the SIEV 5 passengers claim that the Australian navy left them unescorted, drifting on the high seas just beyond Indonesia waters in a barely seaworthy vessel, so that when the engine broke down several hours later, they were helpless. One refugee who was a mechanic and electrician opened the engine cover and unsuccessfully tried to hotwire the engine. He estimates that when intercepted by the Australians they had had as much as 600-700 liters of oil left, but the Australians confiscated their oil reserves so that they would only have enough to go in one direction, toward Indonesia.¹⁸⁸

Inhuman conditions of detention aboard “SIEV 7”

The boat known as SIEV 7, carrying 215 passengers, departed Indonesia on October 16, 2001, and was detained and returned by the Australian navy sometime between October 22 and 29. Asylum seekers who were on board this boat told Human Rights Watch that they were detained for seven days on an eight-meter-long boat under the open sky, in overcrowded conditions, without adequate medical care. Everyone’s eyes were red and swollen with viral conjunctivitis. Two times a day they were given a handful of food and some water, which was not enough in the heat.¹⁸⁹ An unaccompanied seventeen year

¹⁸⁶ Human Rights Watch interview No.17, Mataram, Indonesia, April 15, 2002, corroborated in every detail by a separate, private interview with her husband, who said he was struck exactly four times and “They must have been electric — otherwise four strokes, even hard jabs, would not have made me completely unconscious.” He shakes as he remembers this beating and says he will never forget it: “When I was a child, the Mujahadin beat me and I never forgot that, so how could I forget this beating by Australia just last year?” Also corroborated by: Human Rights Watch interview No. 22, Mataram, Indonesia, April 18, 2002 & Human Rights Watch interview No.31, Mataram, Indonesia, April 19, 2002.

¹⁸⁷ An Australian Commonwealth officer may, under domestic law, use “reasonable force” in pursuit of border protection. Migration Act 1958, Division 12A, Section 245F(10). On August 28, 2001, at the start of the Tampa Crisis, the then chief of the Australian Defence Force (ADF), Admiral Chris Barrie, wrote an order that all activities under Operation Relex “are to comply with international law and domestic legislation.” Under international law, everyone (including each asylum seeker or refugee) has the right to security of person (ICCPR, Art. 9). The Havana *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (1990), Principle 5(a) requires that law enforcement officials shall “exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved,” and shall “minimize damage and injury, and respect and preserve human life.” Sometimes the mass influx of refugees at borders is cited as a security problem for governments, however the Basic Principles state that “exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from the...basic principles” stated above, as well as several others relating, for example, to medical care.

¹⁸⁸ Human Rights Watch interview, No. 22, Mataram, Indonesia, April 18, 2002.

¹⁸⁹ Human Rights Watch interview, No.21, Mataram, Indonesia, April 18, 2002.

old Pashtun boy said his skin was peeling off in large pieces, he had a sore and swollen throat and ulcers in his mouth, but was not given suncream or any other treatment for the seven days that he sat without shade under the supervision of the Australian officers.¹⁹⁰ A companion confirmed: “We begged in English ‘Please just take us into the shade, or let us get on land so that we can lie down and sleep’ but this was refused. We had no bath for seventeen days, and so we all had skin diseases.”¹⁹¹ A third man added that it was terrible to see the shade of the trees on Ashmore Island tantalizingly close.¹⁹²

At one point, after about four days, a number of the men detained on the fishing vessel jumped into the water. The reasons asylum seekers gave Human Rights Watch for doing so varied from a desire to wash and cool their skin, to an attempt to swim to land or to drown themselves in despair. The Australians fished them out one by one, the asylum seekers told Human Rights Watch, and beat them as punishment. They allege that they were later beaten again to subdue their protests when they were told that they were being taken back to Indonesian waters. A young man from Afghanistan, traveling with his brother and crippled sister, recalls seeing that one of the Iraqi swimmers was struck once and so cut above his eye with an “iron stick.”¹⁹³ One Iranian was kicked and punched many times by an Australian officer.¹⁹⁴ These beatings took place on the fishing boat, within sight of other asylum seekers who told Human Rights Watch: “We shouted, but could do nothing.”¹⁹⁵

As with SIEV 5, the family groups from SIEV 7, some ninety people in all, were transferred on Saturday October 28 onto the Australian naval ship, the HMAS Arunta, for return to Indonesia. Meanwhile the remaining single male asylum seekers remained on board the fishing vessel as the Arunta escorted it back to Indonesian waters. As with those who were disembarked from HMAS Warramunga, the families who were on HMAS Arunta were handled with disproportionate force when disembarked. A Hazara widow with a baby explained to Human Rights Watch that she witnessed another woman who resisting being beaten until she fainted. This woman was then thrown “like a dead body” down to the speedboat. They took her own baby from her and “threw it over the side, into the speedboat. I was afraid that, because the two boats were rocking on the waves, my baby would fall into the gap between them. When I was thrown down by my arms, at first I could not find my baby and panicked...”¹⁹⁶ One woman who was epileptic had also passed out and was thrown back on the fishing boat while still unconscious.¹⁹⁷

The approximately 160 single men had been confined to the lower cabin for over forty-eight hours, in excessively cramped conditions and without adequate ventilation. “They told us to go down there just for a few minutes, because they wanted to tell us something. We were sitting with our legs wrapped together and some had to stand. Then about forty commandos came on board and took over the top part of the boat. They pulled up the wooden ladder which went down into the box.” Asylum seekers told Human Rights Watch that every three to five minutes someone passed out from the heat and smoke and had to be lifted up onto the deck to have water thrown on their face to revive them, then were quickly returned to

¹⁹⁰ Human Rights Watch interview, No.23, Mataram, Indonesia, April 18, 2002. According to the *Convention on the Rights of the Child*, Article 22(1), a Contracting State is required to provide intercepted migrant and refugee children with “appropriate protection and humanitarian assistance,” which should be understood as including food, water and medical care that is adequate rather than minimal.

¹⁹¹ Human Rights Watch interview, No.18, Mataram, Indonesia, April 15, 2002. Also corroborated by: Human Rights Watch interview, No.27, Mataram, Indonesia, April 17, 2002.

¹⁹² Human Rights Watch interview, No.24, Mataram, Indonesia, April 18, 2002.

¹⁹³ Another Afghan man also witnessed these beatings with “iron sticks that can be small and then extend”. Human Rights Watch interview No.21, Mataram, Indonesia, April 18, 2002.

¹⁹⁴ Interestingly, this witness recalls that the Australian officer who dealt out this most violent beating was not seen again after this incident, suggesting that his superiors took him off duty.

¹⁹⁵ Human Rights Watch interview No.25, Mataram, Indonesia, April 17, 2002, and corroborated by Human Rights Watch interview No.27, Mataram, Indonesia, April 17, 2002.

¹⁹⁶ Human Rights Watch interview No.13, Mataram, Indonesia, April 15, 2002.

¹⁹⁷ Human Rights Watch interview No.27, Mataram, Indonesia, April 17, 2002.

the hull. Each person was only allowed to go up to the toilet once every twenty-four hours. They were resigned to these conditions, believing that they were being taken to Australia, but in fact the Australian navy, with army units on board, was returning them to the edge of Indonesian waters. The men said to Human Rights Watch that they were kept in the lower cabin so that they could not see the direction of the sun and tell North from South. When they were told that they had been returned, “It was like thunder in a dark place.”¹⁹⁸ The asylum seekers claim capsicum spray was used to subdue them after they learned of their fate. The spray, combined with their conjunctivitis, had a devastating effect on their vision. “There were some hysterical cases and the Australians misinterpreted this as violence. They thought they were going to hit them or something, but it was very normal for someone to be hysterical in that situation.”¹⁹⁹

Another asylum seeker named Faizan was in that cabin until he lost consciousness on the second day and had to be taken up on deck. Before being taken out, he recalls seeing others who had tried to crawl up the hatch being beaten down and claims that an Australian soldier struck him with an electric baton once on his upper right arm and once in the middle of his lower back. “I was a relatively healthy man, but I blacked out after being struck only once or twice. It felt like having your finger in a socket. It made my body jump.” He said to Human Rights Watch that some ten men were hit with some other sort of stick as they tried to climb up. The Australian officers also tried to control the situation by throwing buckets of salt water and spraying one large fire extinguisher of foam down the hatch. Faizan was at the front of the group, near the hatch, so he saw all this clearly.

They threw things down to hit the ones they could not reach with their sticks. Then they threatened to close it, and this made us become quiet because we knew we would all suffocate very quickly if they closed the hatch. Soon afterwards they brought back the families. One tall man among us, who could see over the edge of the hatch, asked what had happened to the families and why were they all crying. They [the women] told us they had been beaten. When one woman knelt down to speak to us through the hatch, an Australian officer struck her with his fist to the back of her neck. This made me so angry that I started to try to climb up again, but they said ‘If you come up, we’ll shoot you.’

On the other hand, he remembers seeing two Australians cry. “I asked them why they were crying, and they said, ‘We are also human, but we can’t do anything because these are orders from our superiors. If it were possible I would take you back to my own home...’” Faizan does not know the names of these men, who spoke with him through the hatch for only a minute or two.²⁰⁰

The passengers of SIEV 7, like those of SIEV 5, allege that their vessel was too poorly repaired to be left by the Australian navy unescorted in the open seas: “They left the boat in a wrecked condition. The high waves from behind their speedboats as they went away almost capsized us. They did not even leave us a compass.” Even if the vessel were perfectly seaworthy, the excessive passenger load (over two hundred persons on a vessel built to carry no more than sixty at most) would qualify it as a vessel “in distress,” as defined under international maritime law.²⁰¹ Evidence has since emerged that throughout these operations there was intense pressure from the Australian government Ministers on the Royal Australian Navy to keep asylum seekers on “marginally seaworthy” vessels that were at risk of sinking.²⁰²

¹⁹⁸ Human Rights Watch interview No.18, Mataram, Indonesia, April 15, 2002.

¹⁹⁹ Human Rights Watch interview No.27, Mataram, Indonesia, April 17, 2002 & corroborated by: Human Rights Watch interview No.23, Mataram, Indonesia, April 18, 2002.

²⁰⁰ Human Rights Watch interview No.24, Mataram, Indonesia, April 18, 2002.

²⁰¹ Section 207 of the Australian Navigation Act 1912 defines a “seaworthy” vessel as one that “is not overloaded.” If a vessel is left in an unseaworthy condition, it is not just a violation of international maritime law [*International Convention for the Safety of Life at Sea*, 1974, Chapter 5, Regulation 15] but also may endanger lives and so be a violation of the right to life (ICCPR, Article 6).

²⁰² “Secret File: Operation Relux,” *Sydney Morning Herald*, October 28, 2002. See also: CMI Report, p.27 and Transcript of Evidence, CMI 296.

An Iraqi asylum seeker from SIEV 7 told Human Rights Watch that, on departing, the Australians shouted, “If you ever come back, we will fire on you!” and this convinced the majority of the refugees to vote to go back toward Indonesia rather than try to find another way to Australia. They traveled for fifteen or sixteen hours, and the engine lasted until they were within about 400 meters of land, which they later learned was the Indonesian island of Roti. It was the middle of the night, around 3:00 a.m., and the water was rising inside the boat. The Indonesian crew was the first to dive into the water and swim to shore, followed by those refugees who could swim. They feared that the boat would be washed further out to sea if they waited. Those who could swim went back and forth in the darkness, carrying babies and children on their heads. Finally everyone jumped off and waded, in water up to their necks, to the shore. One of the mothers on this boat remembers occasionally slipping as she waded with her baby balanced on her head so that they both went under water for a few seconds. “The Australians did not care whether we would make it safely back to Indonesia,” she concludes.²⁰³

It is not certain that everyone made it back safely that night. Three passengers remain unaccounted for by the other refugees.²⁰⁴ The difficulty of verifying their fate only underlines the fact that Australia made no formal arrangements with Indonesia for safe reception of these asylum seekers, but relied on casual notification and tacit acceptance — a practice far removed from the legal standards for “safe third country”²⁰⁵ returns contained in the Australian Migration Act²⁰⁶ or in Europe’s Dublin Convention.²⁰⁷ In October-December 2001 the Indonesian authorities were, as DIMIA puts it, merely “advised that four boats were returned. What then happened in terms of reception arrangements is really a matter for the Indonesian government, but we certainly did take steps to let them know.”²⁰⁸

Denial of allegations by Australian government

Officials of the Australian Ministry for Defence, in testimony before the Senate, have categorically denied certain parts of these accounts — in particular, the charge that electric batons of any kind were used during the interceptions²⁰⁹ and the charge that the vessels were not in a seaworthy condition when

²⁰³ Human Rights Watch interview No.13, Mataram, Indonesia, April 15, 2002.

²⁰⁴ Human Rights Watch interview No.27, Mataram, Indonesia, April 17, 2002. Note that several documents relating to this operation were censored prior to release to the public. See “Damaging documents withheld or censored,” *Sydney Morning Herald*, October 28, 2002.

²⁰⁵ Generally speaking, “safe third country” policies prohibit asylum seekers from accessing a country’s refugee status determination procedures if, prior to arrival in that country, they traveled through another, purportedly “safe” country where they did or could have applied for refugee status and/or obtained protection. The asylum seeker will be returned and readmitted to the third country, and is obliged apply for asylum there instead of at their intended destination.

²⁰⁶ Australian Migration Act 1958, section 91, subdivisions AI and AK.

²⁰⁷ Article 4 of the Dublin Convention [*Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities*, June 15, 1990, 30 ILM 425 (1991)] recognizes the primacy of immediate family unity in determining the country responsible for examining an asylum application and Articles 3(4) and 9 allow states to consider family, cultural or other individual factors before effecting a return. The standards for determining ‘effective protection’ are also much higher. In one case of the European Court of Human Rights [*Decision as to the Admissibility of Application no.43844/98 (TI v United Kingdom)*, ECHR, March 7, 2000] it was even found that the United Kingdom should not “rely automatically...on the arrangements made in the Dublin Convention.”

²⁰⁸ DIMIA evidence to Australian Senate Inquiry into a Certain Maritime Incident, 822ff, April 16, 2002.

²⁰⁹ Very similar allegations with regard to the use of *electric* batons have also been made by asylum seekers who were on board other SIEVs and taken to Nauru and Papua New Guinea and who have therefore had no opportunity to confer with those interviewed by Human Rights Watch in Indonesia. The “Christmas Island Group” at Nauru (some 200 people) claim that the Australian Defence Forces made them spend nine days in a hull of a boat, throwing water on them and prodding them with electric batons, for example.

the naval escort withdrew.²¹⁰ Furthermore, Commanders of the Royal Australian Navy have given testimony to the effect that the humanitarian needs of those on board all such intercepted vessels were met “well beyond the fulfillment of safety of life at sea obligations.”²¹¹

Defence Ministry officials do admit, however, that the people were moved and confined broadly as described above, that metal batons and capsicum spray were used to subdue the asylum seekers, and that they left the vessels as overloaded as when they found them.

The actions of the Australian officials during these interceptions, in the view of the Australian government, were fully in accordance with the September 2001 legislation. Section 5 of the Border Protection Act (2001) introduced increased powers of restraint of liberty, search and forcible movement at sea. The Australian Ministry for Defence claims that the force used on SIEVs 5 and 7 was “reasonable,” within the meaning of the Australian Migration Act and international law, because there was a high degree of provocation, such as the asylum seekers threatening to disable the engine or to set themselves on fire using engine fuel.²¹² A senior naval officer has concluded, however, that the behavior of the asylum seekers was directly related to the change in Australian government policy in relation to SIEV 5, the first boat to be summarily sent back to Indonesia.²¹³

Conclusion

In the interceptions of both SIEV 5 and 7, the Australian actions amounted to “rejection at the frontier.”²¹⁴ Interceptions of asylum seekers that commence as rescues at sea should always lead to prompt access to a state’s territory for the purpose of considering their claims, and treatment of intercepted persons should at all times accord with both applicable human rights standards and maritime law, with particular measures taken to care for the needs of women and children.²¹⁵

²¹⁰ “[T]here was no use of any electrical cattle prod type implements. The only things the ADF people were equipped with were batons and they carried capsicum spray...I have total confidence that our Navy and Army people who were out there throughout this very demanding operation used minimum force at all times...I am totally confident that the Navy would do everything they could to ensure that the vessels that were turned around and sent back were seaworthy to go back to Indonesia.” Australian Ministry for Defence (Air Marshal Houston) testimony at the Australian Senate Inquiry into a Certain Maritime Incident, 1081-83, April 17, 2002.

²¹¹ See CMI Report, pp.15-16.

²¹² The asylum seekers do not deny these two actions, but the violent or hysterical behavior of some asylum seekers is understandable when viewed in the context of their compelling reasons for secondary movement, fears of chain *refoulement*, abuses already endured at the hands of smugglers and Indonesian police, and after the physical and emotional ordeal of the voyage itself. For most of the persons interviewed, the disappointment of their faith in Australia as a humanitarian country caused greater anger than seemingly greater abuses suffered earlier in their home and asylum countries. One of the men interviewed had made three previous attempts to reach Australia by boat, almost drowning each time, before being intercepted by the Australians in October (Human Rights Watch interview No.22, Mataram, Indonesia, April 18, 2002) and another had made eight previous attempts during which the fishing vessels had caught on fire, been capsized in hurricanes, and gotten lost with broken compasses for days at sea without food or water (Human Rights Watch interview No.26, Mataram, Indonesia, April 17, 2002).

²¹³ Rear Admiral Smith in Transcript of Evidence, CMI 490: “It is certainly fair to say that the change in the behaviour pattern of these people is directly linked to the change in the attitude of the Navy, generated by the policy...”

²¹⁴ See UNHCR Excom Conclusions No. 22 (XXXII) – 1981, No. 81 (XLVIII) – 1997 para h, No. 82 (XLVIII) - 1997 para d (iii), and No. 85 (XLIX) - 1998 para q.

²¹⁵ For standards of humane treatment during interceptions at sea, see The Ottawa Conclusions from UNHCR Global Consultations on International Protection, Regional Workshops in Ottawa, Ontario and in Macau, “Incorporating Refugee Protection Safeguards Into Interception Measures,” May 31, 2001, UN Doc.EC/GC/01/13. See also the conclusions/summary of the ‘Expert Roundtable’ convened by UNHCR in Lisbon on March 25-6, 2002, to discuss rescue-at-sea in relation to refugee protection.

Ashmore Island, beside which the two boats were held, was one of the territories “excised” from Australia’s “migration zone”²¹⁶ in September 2001. This legal fiction of “excised” territory, however, as DIMIA acknowledges, does not obviate the application of the Refugee Convention or other international human rights instruments.²¹⁷ When asylum seekers are within Australian territorial waters or on board an Australian warship, Australia’s obligation to protect refugees is invoked.²¹⁸ What this means, in practice, is that Australia is obliged to ensure that no such refugees are *refouled* by any other state or agency. This would include any rejected asylum seekers who may fall under the protection of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²¹⁹ Furthermore, Australia is obliged not to send refugees to places where they will be denied effective protection, in the sense of threats to their life or freedom, until such a time that they cease to be refugees, though there is no obligation for Australia to provide that protection in Australia rather than in another country.

Australia’s obligations under the Convention on the Rights of the Child (CRC)²²⁰ were also triggered in respect to those on board these vessels that entered Australian territory. The government was therefore obligated to ensure that children on the SIEVs seeking asylum received appropriate protection and humanitarian assistance,²²¹ that they were protected from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment,²²² and that the “best interests of the child” were a primary consideration in any action taken affecting a child on board – including that child’s return to the high seas or to Indonesian waters.²²³ There is no evidence that Australia considered such “best interests.” The children on board were exposed to physical and mental violence, neglect and negligence, and were not assisted to seek protection or even to reach a place of safety.

International law, namely the International Covenant on Civil and Political Rights²²⁴, the Convention Against Torture and the Convention on the Rights of the Child, should have protected those on board intercepted boats such as SIEV 5 and SIEV 7 from “cruel, inhuman and degrading treatment.”²²⁵ The

²¹⁶ The Migration Act 1958 original reference in section 5 gave the gloss that to “enter Australia” meant to “enter the migration zone” and this in turn is defined as “(a) land that is part of a State or Territory at mean low water; and (b) sea within the limits of both a State or a Territory and a port; and (c) piers, or similar structures, any part of which is connected to such land or to ground under such sea; but does not include sea within the limits of a State or Territory but not in a port.”

²¹⁷ Article 27 of the *Vienna Convention on the Law of Treaties* [U.N.Doc A/Conf 39/28, UKTS 58 (1980), 8 ILM 679] states that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

²¹⁸ Australia’s Immigration Minister, Philip Ruddock, has stated that “[t]his change has no impact whatsoever on the territorial coverage of Australia’s international obligations under the Refugees Convention.” Letter from Philip Ruddock to Kenneth Roth, Executive Director, Human Rights Watch, July 2002. *See also* DIMIA Answers to Question on Notice from the Australian Senate Inquiry into a Certain Maritime Incident, 13 June 2002.

²¹⁹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*, U.N. G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, p. 197, U.N. Doc. E/CN.4/1984/72, Annex, 1984, entered into force June 26, 1987. Article 3 of the CAT states that “No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” *See Mutombo v Switzerland*, CAT/C/12/D/13/1993: There was a finding that a state violates its non-refoulement obligation whenever it transfers persons to third countries where they “run a real risk of being returned to a country where they would be in danger of being subjected to torture.”

²²⁰ *Convention on the Rights of the Child (CRC)*, G.A. Res. 44/25, 44 UN GAOR, Supp. No. 49, U.N. Doc. A/44/49, 1989, entered into force September 2, 1990.

²²¹ CRC, Article 22.

²²² CRC, Article 19.

²²³ CRC, Article 3.

²²⁴ *International Covenant on Civil and Political Rights (ICCPR)*, GA Res. 2200 A(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, p. 52, U.N. Doc. A/6316, 999 U.N.T.S. 171, 1966, entered into force March 23, 1976 (ICCPR).

²²⁵ ICCPR, Article 7; CAT, Article 3; CRC, Article 37.

conditions in which the asylum seekers were allegedly detained²²⁶ — preventing their disembarkation onto dry land where they could find shelter, failing to provide adequate food, water and medication, and holding them in an overcrowded space below deck without sufficient ventilation or sanitation or space to move their limbs — would all constitute violations of this right, as would any unnecessary use of force when disembarking families, women and children from the warships.²²⁷ A far stricter standard of “reasonable force” should apply with regard to children. The denial of a medical evacuation to Agha’s wife, a bleeding woman who had just given birth on SIEV 5, may also have violated Australia’s obligation under international maritime law to provide “initial medical assistance, or medical evacuation, through the use of public and private resources,” as stated in the legal definition of any “search and rescue service.”²²⁸

Section 7 of the Border Protection Act (2001) granted any person who acted on behalf of the Australian government, in relation to the powers defined in Section 5 of that Act, immunity from prosecution for any actions taken after August 27, 2001, which was a full month before the legislation was passed. So long as actions fall within the scope of Section 5, there is no domestic remedy available and no judicial scrutiny.²²⁹ This provision has been criticized by the Australian Senate Scrutiny Committee, which says that such unfettered powers raise serious concerns about the abrogation of the rule of law.²³⁰ As with the “excision” of territory, this piece of legislation granting *ex post facto* immunity cannot relieve Australia of its obligations under international law.

Return of asylum seekers to Indonesia

An earlier section of this report (Access to protection in Indonesia) documented the lack of protection for those transiting Indonesia via people-smugglers during the late 1990s and the 2000-early 2001 period. This section looks at the conditions experienced by those expelled from Australia after they were returned to Indonesia. The treatment of these returned refugees is intended as a deterrent to future asylum seekers who contemplate entering Australia by this route.

²²⁶ According to section 5(1) of the Border Protection Act (2001) [now see amended Divisions 12A and 13 of the Australian Migration Act 1958, especially section 245F-8A] the “restraint on...liberty” experienced by the asylum seekers on their boats and on the Australian navy ships was not detention and was not unlawful. However, the fact that there were no limits on the severity or the duration of such a “restraint...on liberty” may mean that it amounted to detention, even arbitrary detention, under international law. In the case of the Tampa, where people were held on board for ten days, for example, a dissenting Federal Judge found that the restriction on the asylum seekers’ liberty had been significant enough to amount to detention. As detention, certain obligations with regard to conditions would be triggered, which were clearly not met in any of these cases — e.g. ICCPR, Article 10: the right of all persons deprived of their liberty to be “treated with humanity and with respect for the inherent dignity of the human person.”

²²⁷ *The Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the U.N. Convention against Transnational Organized Crime*, Doc A./55/383 – signed by Australia on December 21, 2001, but not yet in force – obliges a Contracting State to treat smuggled migrants humanely and to protect their rights under the Protocol (Article 14), including taking special account of the needs of smuggled women and children (Article 16(3)). It also requires a Contracting State to train its patrolling officers in the humane treatment of those smuggled and the protection of their rights.

²²⁸ See International Convention on Maritime Search and Rescue (Hamburg, 27 April 1979), of which Australia is a signatory: definition of “rescue” contained in its 1998 Amendments (London, 18 May 1998).

²²⁹ The Border Protection Act (2001) “clarified” the powers of Section 245F(8) of the Migration Act 1958 and Section 185(3) of the Customs Act (1901). It retrospectively validated actions taken in relation to the Tampa and other boats after 27 August 2001. Subsections 185(3A) of the Customs Act and 245F(9) of the Migration Act now extend the power to move people on ships by force. Ancillary search powers in relation to asylum seekers were also created.

²³⁰ It remains to be tested whether a Commonwealth Ombudsman or the Australian Human Rights and Equal Opportunities Commission (HREOC) can receive complaints from people now overseas who were treated abusively by Australian Commonwealth officers within Australian territorial waters.

Lack of “effective protection” following return

Asylum seekers who were forced back to Indonesia did not have a legal right to re-enter. Nor did the governments of Australia and Indonesia sign a formal readmission agreement to guarantee the returnees’ protection or even access to refugee status determination procedures. What Australia calls the “Regional Cooperation Model,” of 2000²³¹, was just an agreement to target and disrupt people-smuggling operations with no guarantee for refugee protection. The Indonesian government temporarily suspended this agreement on September 12, 2001, as a result of diplomatic tension over the Tampa incident²³² and signed a bilateral agreement with Australia in June 2002, again focused solely on combating people-smugglers.

In the absence of any readmission agreement, Australia cannot count on Indonesia to offer protection. Indonesia is not a party to the Refugee Convention and has no national asylum legislation. At most, it is bound by the principle of *non-refoulement* that is now part of customary international law.

Indonesia unequivocally refuses to grant any legal status that would facilitate the local integration of refugees. Nor is it a state capable of guaranteeing informal refuge for any sustained period, because of intense pressures on its own resources and its own uneven record regarding the rule of law. The provision of temporary refuge in Indonesia is therefore entirely dependent upon UNHCR and IOM, organizations which do not have the same legal accountability as a sovereign state and which rely upon cooperation from Indonesian authorities at their discretion. Temporary refuge also depends resettlement of all refugees to other countries, as in Jordan or Syria. Because asylum has no basis in Indonesia’s domestic legislation and would collapse without UNHCR, Indonesia cannot be considered to offer effective protection. It was only on September 30, 2002, almost a full year after the forced returns by Australia, that the Indonesian Immigration Directorate General issued a directive on “Procedures Regarding Aliens Expressing their Wish to Seek Asylum or Refugee Status” which incorporates the principle of *non-refoulement* and guarantees respect for UNHCR-issued documentation.

The Australian government has listed the reasons why it believes that return to Indonesia does not constitute a risk of even “chain *refoulement*,” that is, indirect *refoulement*. Three of its stated reasons rely upon the presence of UNHCR and IOM, and the fourth reason is the lack of previously documented cases of Indonesia’s *refouling* refugees from these particular nations.²³³

However, there have been a number of protection failures in Indonesia stemming from the precarious position of the Middle Eastern and Afghan asylum seekers and refugees there and the government’s policy of housing them in remote locations. Such incidents demonstrate that the presence of IOM and UNHCR in Indonesia does not guarantee that the Indonesian authorities, especially local authorities, are willing or able provide effective protection.

In March 2000, a group of Indonesian men came to an “immigration center” in Selong and attacked the Iraqi and Afghan asylum seekers there, first beating the men with swords and sticks and later attacking some of the women and children. There had been many warning signs of tension between the asylum seekers and local community, which UNHCR had done its best to dispel. The next day the chief of the local police visited the refugees and left the impression that he had turned a blind eye to the attack, or even encouraged it. Using one Iraqi asylum-seeker as an interpreter, he told the victims: “This was done to teach you a lesson. This was the first lesson. The second lesson will be your deaths.” One of the refugees present during the attack, a man named Mahmoud, called UNHCR and IOM to report the attack

²³¹ The Australian and Indonesian governments, UNHCR and IOM put this informal arrangement in place in early 2000, with the Australian government and IOM exchanging letters on the arrangements on July 20, 2000.

²³² Testimony of Australian Federal Police commissioner Mick Keelty to the Senate Inquiry into a Certain Maritime Incident. *Also see*: “Jakarta froze boat people pact,” *The Age*, July 12, 2002.

²³³ DIMIA, “Principled Observance of Protection Obligations and Purposeful Action to Fight People Smuggling and Organized Crime: Australia’s Commitment,” and draft of the same document sent to Human Rights Watch by DIMIA: “Australia’s Commitment to Both Refugee Protection and Combating People Smuggling.”

and a few days later UNHCR staff flew in from Jakarta.²³⁴ A series of emergency meetings were held with the local authorities and with IOM, and a UNHCR representative assured the asylum seekers that she had had a guarantee from the Ministry of Defense that there would be no more attacks. “They [UNHCR] did their best, but the problem in this country is corruption, so there is limited protection for us in the countryside,” Mahmoud commented.²³⁵

Another serious lapse in protection occurred at the same “immigration center” soon after the March 2000 attack. The same local chief of police gathered all the asylum seekers in the center’s main hall and locked the doors. He then entered with an Iraqi diplomat,²³⁶ along with a representative of the Indonesian Ministry of Foreign Affairs and four other unidentified men in suits. When some of the refugees saw the Iraqi consul they were afraid and tried to leave the hall, but were prevented from doing so. The consul told the refugees, “You have to return back to Iraq. You don’t need any guarantee of your safety.” Meanwhile one of the men in suits kept taking flash photographs of the refugees’ faces, ignoring their loud pleas for him to stop. The Iraqi consul translated the conversation into English for the Indonesians and when one English-speaking Iraqi refugee overheard him saying that most of the refugees were common criminals who left to evade the laws of Iraq, he interrupted to object. The Iraqi consul then turned on him and addressed him threateningly by his full name.²³⁷ This incident created a large number of *sur place* claims,²³⁸ which UNHCR recognized.²³⁹

In a third incident, on April 20-21, 2002, an Indonesian mob attacked 146 Afghan and Iraqi refugees and asylum seekers living in Cisawa, a town about an hour and a half from Jakarta. Some thousand people occupied the main street and set fire to hotels where asylum seekers were accommodated by IOM. When the local police intervened, the mob attacked the police station and vehicles, forcing the police to retreat.

According to the refugees, the mob was made up of a fundamentalist/militant Islamic group along with others who had been angered by the presence of Saudi Arabian sex tourists in the area. The mob made no distinction between the tourists and the resident refugees, indiscriminately attacking all people of vaguely Arab appearance, including Afghans. Resentment of the assistance provided to the refugees by UNHCR and IOM may also have motivated the attackers, as it was reported that the mob stole money from their rooms in the Serinjana Hotel as they rampaged through, smashing windows, televisions, and other possessions. After the police failed to restore order, the refugees had to lock themselves into their homes and hotels and arm themselves with sticks. Others, including families with young children, fled into the fields and jungle to hide overnight. The attacks continued the following day, although no one was seriously injured. IOM promised one refugee leader that they would arrange for extra police to be sent to Cisawa, but when refugees emerged from their rooms at midnight on April 21, no police nor hotel staff were on guard and the front gate was wide open.

A week earlier, one refugee woman, living alone with her four children in Cisawa, had reported to IOM the stabbing of a Saudi tourist in the courtyard of her hotel, but IOM had done nothing to allay her fears and UNHCR had not offered to re-house her someplace safer.²⁴⁰ Similarly, after the attacks, UNHCR dismissed the attack with the comment that single males among the asylum seekers in Cisawa had provoked the attack by making advances to Indonesian girls and married women, adding that the

²³⁴ Mahmoud told Human Rights Watch that the police chief had ordered the attack as punishment for the actions of the single refugee men towards the local Indonesian women – “marrying” them informally but then abandoning them after sex. Human Rights Watch interview No.1, Jakarta, Indonesia, April 8, 2002.

²³⁵ Human Rights Watch interview No.1, Jakarta, Indonesia, April 8, 2002.

²³⁶ He introduced himself as the Consul, Mr Qaiss Hameed.

²³⁷ Human Rights Watch interview No.1, Jakarta, Indonesia, April 8, 2002.

²³⁸ A person who was not a refugee when she left her country, but who becomes a refugee at a later date, is called a refugee “*sur place*.” See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, para. 96.

²³⁹ Human Rights Watch interview with UNHCR Jakarta, April 2002.

²⁴⁰ Human Rights Watch interview No.6, Cisawa, Indonesia, April 11, 2002.

refugees were well enough protected “so long as they stayed within their hotel grounds and behaved themselves.”²⁴¹

The attacks in Cisawa point up Indonesia’s own internal security problems and the potential for ethnic and religious violence, which Australia’s interception and return policy only exacerbates. In July 2002, the refugees in Jakarta reported to Human Rights Watch that even in the capital they were suffering increased racial attacks by local Indonesians.²⁴²

IOM as Australia’s agent in Indonesia

The International Organization for Migration, based in Geneva, serves its member states and is not accountable to the U.N. General Assembly or bound by any international human rights treaties.²⁴³ It views itself as exempt from its member states’ international legal obligations, including the prohibition against *refoulement*.²⁴⁴ Indeed, it acts as if it is primarily accountable on each project to its donor or contractor, in this instance, Australia. The primary aim of IOM is the promotion of “humane and orderly” migration, which makes the organization inherently unsympathetic to the idea that illegal secondary movements may be a necessary safety valve for many individuals living within today’s imperfect global system of refugee protection.

In May 1997 IOM and UNHCR signed a memorandum of understanding on joint cooperation with a focus on the return of rejected asylum seekers and “irregular migrants.” Further work is required by both UNHCR and IOM to clarify their respective roles in circumstances where there are substantial numbers of people in need of protection among so-called “irregular migrants,” including refugees who have made secondary movements in search of effective protection.

The IOM program in Indonesia commenced in January-February 2000. Since then it has been contracted by Australia for the care and maintenance of 3,762 persons in Indonesia whom IOM call “irregular migrants” or “stranded transit migrants.” Of these, 734 remained under IOM care, as of October 31, 2002, awaiting decisions from UNHCR as to whether they should be declared refugees.²⁴⁵ The rest have been recognized as refugees and resettled or are awaiting resettlement, or have been assisted to return to Afghanistan.²⁴⁶

When the Indonesian authorities identify or arrest an “irregular migrant,” whether trying to transit toward Australia or returned after interception by Australia, they are supposed to notify IOM. IOM then arranges for their material assistance, pending deportation. Such persons must express an interest in seeing UNHCR or in seeking asylum before IOM notifies UNHCR about them. In practice, IOM concedes, nearly all “irregular migrants” of Middle Eastern or Afghan origin ask to seek asylum and are referred to UNHCR. Of 3,348 persons who have had files in UNHCR Jakarta’s Protection Unit, as of March 31, 2002, 41 percent have been Afghan, 46 percent Iraqi, and 6.5 percent Iranian. Despite the fact that all such “irregular migrants” end up seeking asylum, IOM does not accept that these individuals were compelled to make secondary movements or that therefore its own role as their first point of contact is inappropriate.

Many of the people assisted by IOM have no real idea of the organization’s role or how to lodge grievances about its actions or the levels of assistance it supplies. One Iraqi asylum seeker told Human

²⁴¹ Human Rights Watch interview with UNHCR Jakarta, April 2002.

²⁴² E-mail from refugee in Jakarta to Human Rights Watch, received July 10, 2002.

²⁴³ Originally the Intergovernmental Committee for European Migration (ICEM), it was founded in 1951 and has assisted eleven million refugees and internally displaced persons to return or resettle since that time.

²⁴⁴ IOM Legal Services, “IOM and Effective Respect for Migrants Rights,” November 1997.

²⁴⁵ Statistics provided by IOM to Human Rights Watch, November 20, 2002.

²⁴⁶ Since May 2002, 198 Afghan asylum seekers and rejected asylum seekers have voluntarily repatriated from Indonesia. Statistics provided by UNHCR Jakarta office, as of October 31, 2002.

Rights Watch that he guessed IOM was a humanitarian non-governmental organization funded by private donations from concerned western citizens, and as such he was very grateful for this charity.²⁴⁷ IOM Jakarta's Chief of Mission, meanwhile, explained to Human Rights Watch that IOM is "not, strictly speaking, a humanitarian organization."

IOM's operations in Indonesia are almost wholly funded by Australia, an estimated US\$250,000 per month, of which some 80 percent is spent on direct assistance.²⁴⁸ When asked whether any conflict of interest ever arises between the humanitarian components of the program and Australia's plainly deterrent purpose, IOM stated that no funding is "ever completely disinterested" but categorically denied that the program in Indonesia is overly influenced by Australian policy: "We are a very practical organization, providing services to both migrants and Member States. Australia is benefiting from the program but we are not facilitating their policy. That is not our prime objective."²⁴⁹

IOM Headquarters emphasizes that the program was instituted at the joint request of both the Australian and Indonesian governments, though Indonesia is not a member state of IOM. This was done supposedly because both governments were "concerned about conditions of detention in Indonesia."²⁵⁰ This motivation seems at odds with the program's original title — "The Interception Program" — but the fact remains that asylum seekers and migrants are much better accommodated and assisted by IOM in hotels than if they were held in Indonesian police prisons or "quarantine centers," as many were while in transit during the 2000-early 2001 period.

UNHCR told Human Rights Watch that it declined to play the lead role in caring for asylum seekers stranded in Indonesia, out of principled objections to Australia's interception policy.²⁵¹ IOM then stepped in. IOM Headquarters denies that it has a "lead role" at all, but claims it has a symbiotic relationship with UNHCR, which still has the lead on protection of asylum seekers. Traditionally, IOM has concentrated on the return of rejected asylum seekers, a role that is usually less problematic in terms of IOM's lack of protection mandate.²⁵² It has rarely been so fully involved with asylum seekers prior to status determination as it is in the Indonesian and Pacific programs currently funded by Australia.

If reports are reliable that there are no new arrivals from the Middle East or South Asia to Indonesia, and if UNHCR soon finishes determining the status of all asylum seekers, then IOM's role will revert to its traditional one of assisting rejected cases. For those who cannot return to their countries, however, there may be no solution apart from long-term dependency on IOM assistance in Indonesia.

Concerns regarding IOM assistance

Quality of assistance

IOM Jakarta intends to provide "basic needs assistance" to asylum seekers. In April 2002 it refused to share internal guidelines on how it defines "basic needs" because these were being "constantly revised," but it told Human Rights Watch that IOM planned to raise the level of assistance in the near future.²⁵³ The living standards of the local Indonesian population were said to be one consideration, but

²⁴⁷ Human Rights Watch interview No.28, Mataram, Indonesia, April 18, 2002.

²⁴⁸ Human Rights Watch interview with IOM Chief of Mission, Jakarta, April 2002.

²⁴⁹ Human Rights Watch interview with IOM Chief of Mission, Jakarta, April 2002.

²⁵⁰ Human Rights Watch interview with IOM Geneva, June 2002.

²⁵¹ U.S. Committee for Refugees, "Sea Change," February 2002, p.11. Confirmed during Human Rights Watch interview with UNHCR Jakarta, April 2002.

²⁵² Regarding IOM's lack of a formal protection mandate, see IOM Legal Services, "IOM and Effective Respect for Migrants Rights," November 1997. IOM signed a Memorandum of Understanding with UNHCR on joint cooperation in May 1997, which agreed that IOM would increase its lead role in return of non-refugees.

²⁵³ Human Rights Watch interview with IOM Chief of Mission, Jakarta, April 2002. UNHCR's guidelines on material assistance are, by contrast, publicly available. See e.g. UNHCR guidelines on refugee women and on refugee children.

not the only one. In practice, the assistance consists of emergency medical care, food, and accommodation in buildings that are usually hotels at the most basic level (including water and electricity).

IOM admitted that it was “struggling with” defining which medical conditions it should and should not treat. It stated that it currently aims to treat acute as well as emergency cases, but Human Rights Watch found examples where this was not the case: a woman who had had a baby and suffered from severe uterine bleeding afterwards remained untreated months later, an elderly woman who slipped on the bathroom floor and paralyzed one arm who was denied access to a doctor, as was an unaccompanied Pashtun boy who believed that his nose had been deliberately broken by Hazaras living in his accommodation. Nearly every asylum seeker complained about receiving no treatment for chronic, if minor, ailments such as heat rashes and rheumatism. IOM Jakarta was quick to respond to the more serious individual cases of medical neglect when they were brought to its attention by Human Rights Watch, and said that it planned in future to post an international representative permanently near to where these asylum seekers lived in Lombok. As of November 2002, IOM employed four full-time and two part-time doctors in Indonesia and stated that it was “extremely concerned” to ensure the health of those under its care.²⁵⁴

At the time of Human Rights Watch’s research in April 2002, neither Indonesia nor IOM provided education for child asylum seekers, though this is their human right.²⁵⁵ A single mother complained, “There is no school for my children here, no support except the food from IOM, and no contact with anyone overseas – either back in Afghanistan or my husband in Australia.”²⁵⁶ Asylum seekers in Mataram have self-organized some English and other classes for both adults and children, and at the time of writing IOM reported that it had received permission from the Indonesian government to provide schooling to the children under its care.²⁵⁷ As of October 31, 2002, of the 325 child asylum seekers and refugees in Indonesia, 157 received only IOM assistance.²⁵⁸

Asylum seekers are told by IOM that they will receive no further assistance if they leave the IOM centers in outlying areas for Jakarta. IOM tells Human Rights Watch that this policy is based on the fact that asylum seekers may not change their place of residence without authority from the Indonesian immigration officials, police and local authorities..²⁵⁹

The asylum seekers who were on board SIEV 7, intercepted and returned by Australia in October 2001, described extremely harsh conditions in the first facility where they were housed by IOM following their return, a former police training academy in Kupang. According to one widowed Afghan mother who calls herself Mary, fifty or sixty of the asylum seekers all slept together in a big hall. It was extremely dirty and the food made at least two people so sick that they were taken to hospital. “They fed us fish that were not cleaned. There was no milk, even powder milk, for my baby, no soap or shampoo. My baby got a skin disease there, which she still has on her chest.” Mary spent two months in all in Kupang. Others told her that they were under the care of IOM, but she herself never saw an IOM representative and the local police did all direct management. She was among a group of refugees that tried to go speak to IOM:

²⁵⁴ IOM letter to Human Rights Watch, received November 20, 2002.

²⁵⁵ The right to primary education regardless of immigration status is contained in *Convention Against Discrimination in Education*, 429 UNTS 93, entered into force May 22, 1982, to which Indonesia is a party. See also: Excom Conclusions No.47, 58, 59, 74, 77 and 84.

²⁵⁶ Human Rights Watch interview No.16, Mataram, Indonesia, April 15, 2002.

²⁵⁷ IOM Legal Services letter to Human Rights Watch, received November 20, 2002.

²⁵⁸ This does not include children among rejected asylum seekers, who are also under IOM care. Statistics provided by UNHCR Jakarta, October 31, 2002.

²⁵⁹ Indonesian immigration law provides for restrictions on foreigners’ place of residence for the sake of maintaining public order, though it is unclear how this is the legal basis for the policy, given that the asylum seekers are not legally present under Indonesian law. 1992 Immigration Act, section 42 (2c)

“We spent two full days and nights standing at the door of IOM asking to talk to them, but they just locked the doors against us.” UNHCR could only visit the asylum seekers in a limited way, and could not interview individuals there, due to the UN Phase 5 security situation, which prohibits UN operations, in West Timor at the time. When IOM moved the group from Kupang to Lombok in January 2002, UNHCR came to visit them properly for the first time.²⁶⁰ Other asylum seekers intercepted on board a different vessel spent up to five months in the same center in Kupang, before being moved to Surabaya or near to Jakarta.²⁶¹

Many other witnesses verified the substandard conditions in the facility in Kupang, five barracks each holding thirty-five or forty people, with just three bathrooms and a shortage of clean water. They confirmed that when they tried to talk to IOM, they were ignored. One Pashtun man emphasized to Human Rights Watch that the conditions were especially difficult because they were all suffering from shock after the Australian interception: “We were all mentally traumatized at that time, but we were only given enough to sustain human life — no more.”²⁶² Other men recalled that they were given nothing to sleep on but flattened cardboard boxes, near a pile of rubbish swarming with flies, that there was nowhere private for anybody to wash, and that the food was inedible. “IOM was no assistance. They never gave us hope that we would be moved to another place, and only asked if we wanted to go back to Iran. Since we were afraid of the punishment for leaving Iran illegally, of course we said no.” Eventually, after obtaining authorization from the local authorities, IOM moved the asylum seekers to Mataram, where conditions are physically, if not legally, much improved.²⁶³

Over-emphasis on return

In April 2002, IOM sent the Afghan interim government’s Minister for Refugees and Repatriation to visit Afghan asylum seekers throughout Indonesia who had not yet received decisions on their claims from UNCHR and encourage them to return voluntarily. Afghans eager to return appreciated this visit, bringing much needed news on conditions at home. IOM did clear their plans with UNHCR and held the meeting in a separate location, not the asylum seekers’ accommodations, so that people could voluntarily choose whether or not to attend. The asylum seekers in Mataram, however, told Human Rights Watch at the time that they understood the visit to be a test of whether they were really Afghans or Pakistanis, and so they all felt compelled to attend and affirm their Afghan origin. One young man, a former medical student named Rashad, who was also interviewed by Human Rights Watch in Mataram, did not like “the way they keep trying to encourage us to go back. Only a few of us want to return since the Taliban fell, but many people here have psychological problems, talking to themselves, or crying at night. So even a little pressure can be very harmful to their minds.”²⁶⁴

The failure to assist asylum seekers and refugees in Indonesia to trace their families also placed many of them under undue pressure to return to Afghanistan prematurely. Many refugees and asylum seekers in Mataram claimed that they had repeatedly tried through IOM to contact the International Committee of the Red Cross (ICRC), the agency primarily responsible for assisting with family tracing, or had asked for help finding out what happened to their families, but they received no assistance. Without such assistance, the sense of being honor-bound to look for their families may govern their decisions to return, even when they continue to fear persecution. One Hazara asylum seeker named Rashad, for example, reported that he had told IOM he wanted to return voluntarily only because he felt he had no choice: “Many times I have begged UNHCR and IOM to help me find my family. They said ‘We will contact ICRC and they will help you’ but I have never heard anything from ICRC. Lately IOM has started to answer that it is not their responsibility.” In his asylum interview in January, he again

²⁶⁰ UNHCR letter to Human Rights Watch, received November 20, 2002.

²⁶¹ Human Rights Watch interview No.8, Cisawa, Indonesia, April 11, 2002.

²⁶² Human Rights Watch interview No.24, Mataram, Indonesia, April 18, 2002.

²⁶³ Human Rights Watch interviews No. 34 and 35, Mataram, Indonesia, April 20, 2002.

²⁶⁴ Rashad was among the first group of 32 asylum seekers to repatriate to Afghanistan on May 17, 2002. Human Rights Watch interview No.18, Mataram, Indonesia, April 16, 2002.

mentioned his need for family tracing services to UNHCR but received no help or word from them since.²⁶⁵ One unaccompanied boy was particularly distressed not to have heard from his family since the U.S.-led action in Afghanistan and upset not to have received any response from IOM after repeated pleas for help in contacting ICRC.²⁶⁶

Article 22(2) of the Convention on the Rights of the Child obliges state parties, which include Indonesia and Australia, to co-operate with efforts “to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.” IOM told Human Rights Watch that there had been very few family tracing requests from Afghans or Iraqis in Indonesia “probably as most of the people there have the means to e-mail or telephone their families.”²⁶⁷

Breakdown in communication with asylum seekers

Human Rights Watch found numerous failures of communication between IOM’s staff and anxious asylum seekers and refugees. One asylum seeker in Lombok, the father of three young children, expressed his frustration:

A representative [of IOM] visits about every fifteen days or so, and every time I ask for things we need for the children, but the man just says, “yes, yes,” and then never does anything. The hardest thing is to have no spending money and yet be banned from looking for work in Mataram, though I am young and healthy.²⁶⁸

Refugees awaiting resettlement were particularly distressed because delays in issuing visas caused by additional post-September 11 security checks had not been properly explained to them, and because they felt that they were regarded as trouble-makers if they asked questions.²⁶⁹ Several refugees awaiting resettlement told Human Rights Watch that they were afraid to discuss their treatment by IOM while awaiting their asylum decision because they believed IOM still would have some control over the speed of their future resettlement. Other asylum seekers were not so reticent and complained vehemently about the assistance they were receiving, which they felt was set at a low level in order to push them to go home. While IOM Jakarta stated its intention to employ more psychologists and counselors to treat stress levels among asylum seekers and refugees, and while it acknowledged that some of its local staff were “too quick to run away” when discussions got difficult, it did not appreciate the extent to which stress among the asylum seekers was caused by IOM’s own failures to respond and to keep the beneficiaries of their assistance fully and frankly informed.

Role of UNHCR

UNHCR has had a long-standing presence in Indonesia, where it has performed its “mandate” role²⁷⁰ in screening and protecting the Indochinese boat people and other refugees transiting that country for

²⁶⁵ Human Rights Watch interview No.32, Mataram, Indonesia, April 19, 2002.

²⁶⁶ Human Rights Watch interview No.20, Mataram, Indonesia, April 15, 2002.

²⁶⁷ IOM Headquarters e-mail to Human Rights Watch of October 7, 2002.

²⁶⁸ Human Rights Watch interview No.19, Mataram, Indonesia, April 16, 2002.

²⁶⁹ IOM Jakarta states that it has had an “open door” policy whereby those under its care could visit any day of the week, though at the time of writing this is restricted to two days a week, and that it has explained the reasons for resettlement delays to refugees in their own languages. Letter from IOM Legal Services to Human Rights Watch, received November 20, 2002. If so, these practices were not effective in so far as Human Rights Watch encountered widespread frustration about communication and incomprehension of procedures amongst those it interviewed.

²⁷⁰ The U.N. General Assembly has entrusted UNHCR with providing international protection to refugees, and seeking permanent solutions for them. *Statute of the Office of the United Nations High Commissioner for Refugees*, United National General Assembly, December 14, 1950. Where a state does not have its own refugee determination and protection system, as in Malaysia, then UNHCR performs these tasks in a surrogate capacity, though this assistance in no way diminishes the legal responsibilities of the state itself, for example in relation to *non-refoulement*.

decades. In practice, its operations today include conducting refugee status determinations; providing asylum seekers with registration and refugees with letters of attestation which offer some protection in the absence of an Indonesian immigration status; supplying recognized refugees who are barred from work with material assistance; and finally, helping them find a permanent place of protection, which, in the case of the recent Middle Eastern and Afghan refugees, invariably means finding them a country of resettlement.

UNHCR provides a vital service so long as the Indonesian authorities respect the registration documents issued to asylum seekers and refugees, protecting those who hold them from arrest and deportation. UNHCR gives recognized refugees a letter of attestation valid for six months at a time, which is also used to claim a cash allowance and medical treatment for emergency or acute conditions from the Indonesian Red Cross. Bangun Mitra Sejahtera (BMS), an Indonesian development organization employed by UNHCR as an implementing partner,²⁷¹ also provides the refugees with client cards that they use to register for services such as vocational training.

When IOM brings asylum seekers to the attention of UNHCR, the agency makes arrangements for an asylum interview and subsequently determines whether or not they should be recognized as refugees. Given Indonesian policy hostile to refugee integration, UNHCR must refer the cases of those recognized as refugees to a resettlement country and assist with that selection process. While waiting for resettlement, refugees receive a monthly subsistence allowance of US\$60 per head of household, or US\$100 per adult couple. This is the exact amount that a refugee would receive from UNHCR in Syria and equivalent to twice the wage of an average Indonesian laborer. The allowance is distributed by BMS and must be used to cover all costs, including rent, which can be difficult when the locals charge refugees inflated prices as if they were tourists. UNHCR plays its part in deterring secondary movers by denying the allowance, for the first six months, to asylum seekers who come to Indonesia to join recognized refugee family members. UNHCR claims that exceptions to this policy are made for refugees with children, but Human Rights Watch met at least two families with young children who were supporting themselves entirely on the father's US\$60.²⁷²

UNHCR's presence in Indonesia is cited by Australia in claiming that Indonesia provides effective protection, but UNHCR's presence is an insufficient substitute for state protection. Since the agency continually reiterates the primacy of state responsibility for refugee protection,²⁷³ UNHCR should publicly correct the misrepresentation of its mandated operations for Australia's deterrent purposes.

Australia funds all UNHCR's status determination costs in Indonesia, though not the material assistance provided to the recognized refugees. Like IOM, UNHCR categorically asserts that the earmarked funds from Australia in no way affect their operations. The agency is proud of the principled stand they took not to be the "lead agency" with regard to reception of asylum seekers returned by Australia: "It's not our mandate to fight people-smuggling," one UNHCR spokesman told Human Rights Watch.²⁷⁴

²⁷¹ Note that this use of a local non-governmental organization for the sake of "capacity building" is unlikely to have any long-term benefits now that the asylum seekers have ceased transiting Indonesia, and in view of the fact that BMS does not work with internally displaced persons or on any other human rights related issues. Refugees told Human Rights Watch they felt "treated like children" by BMS and that there was little real consultation on services provided. The information leaflet produced by BMS and UNHCR tells them, rather disingenuously, to "Remember that it is primarily your responsibility to arrange a [durable] solution" and lists local integration as one solution, though this is absolutely prohibited in Indonesia. In relation to the cash allowance, the leaflet also reminds them: "UNHCR's resources are extremely limited!" BMS/UNHCR, *Urban Refugees*, Jakarta, February 2002.

²⁷² Human Rights Watch interview No.4, Cisawa, Indonesia, April 10, 2002.

²⁷³ See e.g. UNHCR, "Note on International Protection" (Geneva, 2000), A/AC.96/930; UNHCR, "Note on International Protection" (Geneva, 1999), A/AC.96/914; or UNHCR Excom Conclusion No. 85 (XLIX) – 1998.

²⁷⁴ Human Rights Watch interview with UNHCR Jakarta, April 2002.

Concerns regarding UNHCR determinations and protection

Quality of refugee status determinations

As of April 2002, of the 3,357 people who had files in the UNHCR Jakarta Protection Unit, sixty-one Afghans, 577 Iraqis, and six Iranians had been granted refugee status. 1,598 had not completed the refugee status determination process and 969 still had their cases pending. The overall recognition rate for UNHCR refugee status determinations in Indonesia, as of October 31, 2002, was 42 percent after appeal.²⁷⁵ Most Afghan claims were rejected, on the basis of changed circumstances since the fall of the Taliban and on the grounds that many of the Afghans are thought to be Pakistani nationals. As of August 3, 2002, 124 persons from a group of 144 Afghans living in one hotel in Mataram had received decisions on their claims, of which 102 were rejections.²⁷⁶ One unaccompanied Pashtun boy remembered his first interview with UNHCR:

They were so nice to me — They said honestly that ‘We will not accept you because it is related to the political situation in Afghanistan.’ I tried to explain that peace was not the issue, that it was because my family had personal enemies, but they said that if anyone from Afghanistan is accepted it will be no more than 2 percent.²⁷⁷

Where UNHCR is responsible for status determinations, it should adhere to and provide a model for implementation of the guidelines and procedures to which it holds governments accountable, specifically the *Handbook on Procedures and Criteria for Determining the Status of Refugees*²⁷⁸ and its *Training Module on Interviewing Applicants for Refugee Status*.²⁷⁹ On several occasions UNHCR’s Executive Committee has reiterated the importance of guaranteeing the efficiency and fairness of status determination procedures²⁸⁰ and new procedural standards for UNHCR refugee status determination operations are at an advanced stage of development. Yet UNHCR procedures in Indonesia, as in many other countries where they operate in place of state decision-makers, lack several important safeguards of due process.²⁸¹

They fail to provide asylum seekers with a transparent set of criteria for the assessment of claims. All asylum seekers interviewed in Indonesia said that they did not know what standard of proof was required for their claim to be considered as credible.²⁸² While one Hazara asylum seeker was entirely satisfied with his two-hour interview and felt that UNHCR had understood his claim was non-Taliban-based, another Hazara alleged that his interview with UNHCR in January 2002 lasted only ten minutes and was “too basic — not in depth.” He asked Human Rights Watch, “I don’t know if the U.N. will make a decision according to human rights as they are supposed to. Who will check that they do this? Can you

²⁷⁵ Statistics supplied by UNHCR Jakarta, October 31, 2002.

²⁷⁶ E-mail to Human Rights Watch from asylum seeker in Mataram, August 3, 2002.

²⁷⁷ Human Rights Watch interview No.24, Mataram, Indonesia, April 18, 2002.

²⁷⁸ UNHCR, *Handbook On Procedures And Criteria For Determining Refugee Status*, UN Doc. HCR/1P/4/Eng/REV.2, 1979 (edited 1992). The *Handbook* was prepared at the request of the UNHCR Executive Committee for the guidance of governments. See Guy Goodwin-Gill, *The Refugee in International Law* (Oxford, 1996), p.34. It is an authoritative interpretative guide and is treated as such by governments. See, for e.g., the U.S. Supreme Court case, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

²⁷⁹ The Training Module advises decision makers that they “should never forget that being recognized – or not – as a refugee will have direct implications on the life and well-being of the applicant and his or her family. This places a heavy burden of responsibility on the person conducting the interview whether or not this person is the final decision maker.” See UNHCR, “Training Module on Interviewing Applicants for Refugee Status,” 1995, p. iii.

²⁸⁰ See, e.g., UNHCR Excom Conclusions No. 71 (XLIV) - 1993 and 82 (XLVIII) - 1997.

²⁸¹ The obligation of due process in asylum cases is primarily derived from Article 33(1) of the Refugee Convention. Similar concerns have been raised in previous Human Rights Watch reports, for example on the Burmese refugees interviewed by UNHCR in Malaysia. See Human Rights Watch, “Living in Limbo” (2000).

²⁸² UNHCR, in the *Handbook On Procedures And Criteria For Determining Refugee Status*, para. 192 (ii), states that “[t]he applicant should receive the necessary guidance as to the procedure to be followed.”

check?” Apart from human rights, he did not know the criteria for the UNHCR’s determination: “According to what do they make their decision? Do you think they will believe CNN more than me?”²⁸³

UNHCR advises states deciding on asylum claims that access to legal counsel is a basic principle of fairness, especially in any appeal or administrative review process, yet it claims that such advisers are unnecessary to help asylum seekers prepare for their UNHCR interview because it is not supposed to be an adversarial process: “There can be no comparison between governments undertaking refugee status determination and UNHCR doing so.”²⁸⁴ Nearly every asylum seeker interviewed by Human Rights Watch in Indonesia, however, stated that they felt the process to be adversarial and experienced the interview as an interrogation. One Pashtun asylum seeker worried about the fact that in his first UNHCR interview he had argued with the Tajik interpreter, who seemed not to believe that there were Shi’as in his province of Afghanistan. The second interview went better, but he felt it was definitely adversarial: “Our minds are not computers. If we make a small mistake they catch it and reject us. We forget things because of how long they make us wait.”²⁸⁵ More reasonably, UNHCR argues that it lacks the resource to facilitate access to legal advice in all the diverse situations where it conducts refugee status determinations and that internal procedural standards are a more feasible means of guaranteeing due process rights. Human Rights Watch believes, however, that this evidence of UNHCR’s severe underfunding should be acknowledged as the serious inadequacy it is, if only to remind certain asylum states such as Australia that asylum seekers should not be returned from well-resourced national determination procedures to places where they are reliant on UNHCR’s procedures.

It is also particularly vital that asylum seekers in Indonesia have access to independent sources of reliable country of origin information. Having come from a third country rather than directly from, say, Afghanistan may mean that they have not lived in their home country for years, so, when called upon to substantiate a credible claim based on conditions since the fall of the Taliban, they may be unaware of what persecution they would currently risk if returned.

Those rejected have no independent appeal. Another UNHCR officer from the same office reviews the decision, and if necessary a second interview may be conducted. In support of these limited appeal arrangements, which primarily result from the serious resource constraints on UNHCR, the UNHCR *Handbook* speaks merely of the right to appeal “to the same or to a different authority.”²⁸⁶ Human Rights Watch believes that there should be the possibility of an appeal and, if necessary a second appeal based on the case file, to an independent body.

In view of the more substantive appeal procedure that rejected asylum seekers may have access to in Australia,²⁸⁷ being intercepted and sent back to the UNHCR procedure in Indonesia deprives them of their due process rights. This deprivation may substantially reduce a genuine refugee’s chances of being recognized, especially when it is combined with the total absence of independent advice.

²⁸³ Human Rights Watch interview No.20, Mataram, Indonesia, April 15, 2002.

²⁸⁴ UNHCR, “Comments and Observations to JRS Report on UNHCR Mandate Status Determination Procedures,” 1998.

²⁸⁵ Human Rights Watch interview No.24, Mataram, Indonesia, April 18, 2002. Like Australia, UNHCR suspended the processing of all Afghan claims for several months until early 2002, and they waited to complete all first interviews before conducting reviews of negative decisions, which left a long interval between the first and second interviews in some cases.

²⁸⁶ UNHCR, *Handbook On Procedures And Criteria For Determining Refugee Status*, para. 192.

²⁸⁷ Appeal to the Refugee Review Tribunal (RRT) involves filing a written appeal, and if this is not accepted then the deciding member of this relatively independent, albeit state appointed, appellate tribunal will conduct a ‘non-adversarial’ interview during an informal hearing. After this, appeal to the Federal and High Courts is also possible, although the grounds for appeal have recently been curtailed.

Communication with refugees

Asylum seekers asked for Human Rights Watch to carry messages into the heavily guarded UNHCR office, where they felt they were not welcome unless summoned to an appointment.. One man claimed he repeatedly tried to make contact but kept being turned away until his file was closed. UNHCR denies this, and says that its telephones are manned to answer calls during three afternoons a week and that it would always re-open such a case if the person “reappeared.” One Hazara family interviewed in Lombok in April 2002 had been waiting for over ten months for first decisions on their claims from UNHCR. When they tried to call the UNHCR office, they claimed the receptionist hung up as soon as they said they were asylum seekers.²⁸⁸ While admitting that communication with asylum seekers in more remote parts of the Indonesian archipelago was “very poor” because it had no staff based outside Jakarta, UNHCR views the complaints from refugees in Jakarta about insufficient communication as unfounded²⁸⁹ and emphasizes that it has procedures to ensure access to the office “in an orderly manner.”²⁹⁰

UNHCR has elsewhere observed that “irregular movers” are “often among the most vehement of protestors”²⁹¹ and has developed internal guidance for its own staff about deflecting or avoiding such protests. Even though UNHCR Jakarta states that it does not consider the intercepted cases to be “irregular movers,” but asylum seekers like any others,²⁹² there seems to be a similar defensiveness toward these urban refugees. This in turn can become a vicious circle, compromising UNHCR’s ability to listen and respond to the legitimate anxieties of asylum seekers and refugees under its protection.

Lack of durable solutions

Resettlement

Australia has been reluctant to resettle refugees from Indonesia unless members of their immediate family are already living there. Other resettlement countries,²⁹³ however, view the caseload in Indonesia as a creation of Australian policy, which makes them extremely reluctant to resettle the remaining refugees, especially when the person’s sole relation, though not a member of the immediate family, is located in Australia. Seventy-seven such cases were identified as of April 2002. In this way, UNHCR Jakarta admits, they are being “held hostage to the principle of burden-sharing” by Australian policy.²⁹⁴

Between January 2001 and October 2002, Australia had resettled 41 refugees²⁹⁵ out of a total of 389 refugees resettled via UNHCR from Indonesia. Most of the them went from Indonesia to other resettlement countries — sixty-five to New Zealand, 111 to Sweden, forty-eight to Norway, and seventy to Canada, which has a very comparable resettlement system in terms of numbers and resources to Australia.²⁹⁶

The Australian government’s position is that by deliberately frustrating refugees from reaching their intended destination it is combating people-smugglers. Instead, the government is prolonging the suffering of refugees in need of protection and assistance. A southern Iraqi refugee still awaiting resettlement told of having to leave his wife and two young children behind in his brother’s care when he fled. The youngest, now three, was a baby just a few months old at that time. He knows that even after

²⁸⁸ Human Rights Watch interview, No. 33, Mataram, Indonesia, April 20, 2002.

²⁸⁹ Human Rights Watch interview with UNHCR Jakarta, April 2002.

²⁹⁰ Comments from UNHCR to Human Rights Watch, received November 20, 2002.

²⁹¹ UNHCR, “Policy and Practice Regarding Urban Refugees: A Discussion Paper,” October 1995.

²⁹² Letter from UNHCR to Human Rights Watch, received November 20, 2002.

²⁹³ Aside from Australia, other resettlement countries to which the Indonesia caseload has been submitted: Burkina Faso, Canada, Chile, Denmark, Finland, Germany, the Netherlands, New Zealand, Norway, Sweden, the United Kingdom and the U.S.

²⁹⁴ Human Rights Watch interview with UNHCR Jakarta, April 2002.

²⁹⁵ Australia is also considering applications from a further 139 and states that it will consider any cases with relatives in Australia. DIMIA statistics provided to Human Rights Watch, November 20, 2002.

²⁹⁶ Statistics provided by UNHCR Jakarta, October 2002.

resettlement, it may take years for him to be able to bring his family to join him. After three years waiting in the “queue” in Jakarta, he became emotional about further delays. He told Human Rights Watch that he faces the prospect of one day meeting a grown child who has never known him as a father and a wife who, he fears, will not remember him as her husband.²⁹⁷ At least thirty of those who drowned on board the ill-fated SIEV-X were refugees recognized by UNHCR who had decided they could not wait any longer for the resettlement process and its distant promise of family reunion.

One Iraqi mother explained that she has had severe gynecological problems for six months which she could not get treated because the local Indonesian hospital would not let her see a female doctor, a necessity for a devout Muslim woman.²⁹⁸ The Iraqi mother who had to run into the jungle to escape the violent mob in Cisawa was also waiting for resettlement to join her husband in Australia.²⁹⁹

Since Australia’s legal obligations under international human rights and refugee law were engaged when many of the asylum seekers entered Australian territorial waters, it follows that Australia should assist these refugees not only to “seek” but also to “enjoy” asylum after a certain period of time.³⁰⁰

Returns with signed consent

The alleged denial of access to family tracing services, the low levels of assistance provided by IOM, and disillusionment with the justness of UNHCR determinations³⁰¹ were all pushing Afghans in Indonesia towards the decision to return, even though they said they could not be sure they were receiving any impartial information about conditions in Afghanistan. The information received from IOM could not be considered impartial, because that agency’s success in contracting its services to Australia is measured partly in terms of how many such persons consent to return.

Human Rights Watch has expressed its view that the time is not yet ripe for “promoting” even voluntary returns to Afghanistan.³⁰² One year after the fall of the Taliban, conditions inside Afghanistan remain extremely unstable and high risks of persecution exist for certain groups, such as the ethnic Pashtuns in the northern provinces of Farah and Faryab and western province of Herat. Those with connections to the former Taliban or Communist regimes are at particular risk. Furthermore, attacks on the Pashtuns may, it is feared, allow the Taliban or a similar group to rebuild a constituency that would later seek revenge on ethnic groups such as the Tajiks and Hazara.

Human Rights Watch has also documented ongoing lawlessness and abuses throughout the south and west of the country, and cautions that it will be a long time before there are reliable constraints on the abuse of power. In most parts of the country, security has been entrusted to regional military commanders — warlords — many of whom have human rights records rivaling the worst commanders under the Taliban. In some areas of central Afghanistan, Tajiks and Hazaras are still locked in ethnic rivalry, which,

²⁹⁷ Human Rights Watch interview No.7, Jakarta, Indonesia, April 11, 2002.

²⁹⁸ Human Rights Watch interview No.4, Cisawa, Indonesia, April 10, 2002.

²⁹⁹ Human Rights Watch interview No.6, Cisawa, Indonesia, April 11, 2002.

³⁰⁰ Universal Declaration of Human Rights, G.A. res. 217A (III), UN Doc. A/810 at 71 (1948), Article 14.

³⁰¹ Yazdon had his refugee status determination interview with UNHCR in January (2002). It lasted approximately forty minutes. “I was not satisfied because they did not get to the heart of my problem. They did not answer when I asked them what would happen to me if I were rejected. My life will still be in danger in Afghanistan, despite the changes, both because I am a Hazara and because the Pashtun people know the part my father played working for Hezb-i Wahdat. I do not believe there is any true authority, just two or three figureheads, with no real ability to protect the people, so I will not volunteer to return no matter what inducements they offer.” Human Rights Watch interview, No. 30, Mataram, Indonesia, April 19, 2002.

³⁰² Human Rights Watch Press Release, “Afghanistan unsafe for refugee returns: U.N. refugee agency sending ‘misleading’ message,” New York, July 23, 2002. *See also:* Human Rights Watch, “All Our Hopes Are Crushed: Violence and Repression in Western Afghanistan,” *A Human Rights Watch Report*, Vol. 14, No. 7(c) - October 2002.

at the local level, creates a high risk of persecution by non-state agents. There is no international security force outside Kabul. In these conditions, those returning to Afghanistan often find themselves unable to return to their homes and so enter a fresh cycle of internal displacement.

IOM claims that around a third of 600 Afghan asylum seekers in Indonesia expressed a desire to repatriate after a visit by the Afghan Interim Authority's Refugee Minister in April 2002.³⁰³ His visit was an example of IOM, with Australia's backing, promoting rather than merely facilitating return, at a time when UNHCR was still warning against doing so because it would put too much strain on Afghanistan's fragile infrastructure and because risks of persecution continue to face numerous individuals.

All IOM return costs are being paid by Australia, and A\$30 million has been pledged by Australia over four years to help Indonesia remove its "stranded transit migrants."³⁰⁴ Australia appears willing to demonstrate a "special responsibility" towards those stranded in Indonesia when it comes to return, if not by granting asylum or resettlement.

Conclusion

Australia's policy of returning asylum seekers to Indonesia penalizes them in a number of ways. Those who must present their claims under UNHCR status determination procedures have no access to independent legal advice, country of origin information or appeal mechanisms, which possibly reduces their chances of gaining recognition. These procedures therefore fail to guarantee refugees full due process protections. If recognized, refugees in Indonesia must live on UNHCR financial handouts rather than enjoying their right to work and the opportunity to immediately begin the process of local integration. The requirement that refugees should apply and wait for resettlement, meeting the discretionary selection criteria of a resettlement country, is an additional obstacle to the acquisition of legal status as a refugee. Denial of resettlement in Australia will prevent many individuals from reuniting with their only family members.

In general, if a penalty is "any unnecessary limitation to the full enjoyment of rights granted to refugees under international refugee law,"³⁰⁵ then being forcibly expelled from the territory of a signatory state to the Refugee Convention to a non-signatory state should be considered a penalty.

Article 31 of the Refugee Convention implies that an individual will have an opportunity to rebut the presumption they have entered illegally without "good cause" before the imposition of any penalty. Asylum seekers were given no such opportunity before being intercepted and returned to Indonesia.

Furthermore, by returning refugees who have entered its territorial waters to Indonesia, Australia has treated Indonesia as if it were a "safe third country," without establishing that is so. The only basis for doing so is that the Indonesian police, at present, agree not to arrest and deport asylum seekers so long as UNHCR and IOM process and assist them. This is not an adequate standard of effective protection. Prior to any transfer or return to a third country, all unauthorized arrivals should be given an opportunity to rebut the presumption of effective protection or "safety" in their own case, as well as a chance to appeal on the basis of family ties or other humanitarian circumstances. Safe third country returns should not be imposed on individual asylum seekers by naval officers during the interception of vessels at sea, where individual interviews were not conducted.³⁰⁶

³⁰³ Human Rights Watch interview with IOM Chief of Mission, Jakarta, April 2002.

³⁰⁴ Quoted in "Government cash could remove asylum seekers," *The (Melbourne) Age*, May 21, 2002.

³⁰⁵ UNHCR Division of International Protection internal memo, May 2002, quoted in: "Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection," Guy S. Goodwin-Gill, UNHCR Global Consultations, October 2001, p.9.

³⁰⁶ See UNHCR Excom Conclusion No.85 (XIX) – 1998 which "stresses that...it should be established that the third country will treat the asylum seeker(s) in accordance with accepted international standards, will ensure effective protection against refoulement, and will provide the asylum seeker(s) with the possibility to seek and enjoy

In addition to the rights of children listed earlier in the context of interception,³⁰⁷ children deprived of their family environment are entitled to special protection and assistance,³⁰⁸ and state parties — in this case both Australia and Indonesia — are obliged to “to promote physical and psychological recovery of all those who are victims of torture or any other form of cruel, inhuman or degrading treatment of punishment.”³⁰⁹ In this context, recovery should mean both a secure status and counseling services for those who were traumatized by events at every stage of their journey — including their treatment at the hands of the Australian navy. Furthermore, both Australia and Indonesia are obliged, under the Convention Against Discrimination in Education,³¹⁰ which applies to “any person” in a country regardless of their immigration status, to provide these children of asylum seekers and rejected asylum seekers with access to education.

Detention of asylum seekers in Pacific states

Australia’s forcible transfer of asylum seekers to places of detention in other countries in the Pacific region penalizes them and acts as a deterrent in a variety of ways. It intentionally obscures state accountability for their protection, shifts responsibility for their detention and for decision-making on their claims outside any statutory framework, and, by removing due process guarantees, endangers their chances of gaining recognition as refugees. It deprives recognized refugees of automatic access to legal status and local integration and disregards the fundamental human rights principle of family unity. As on mainland Australia, arbitrary detention is itself a human rights violation deliberately used as a deterrent.

The basis for penalization and deterrence is the presumption that the persons in question could and should have found protection in another country. No asylum seeker was given the opportunity to rebut that presumption or explain their compelling reasons for secondary movement before being transferred to either Nauru or Papua New Guinea.

Nature of arrangements

Attempt to transfer protection obligations

The removal of intercepted asylum seekers to “a place outside Australia” now permitted by Australian law³¹¹ is of questionable validity under international law. The intercepted asylum seekers never consented to be removed — a fact that distinguishes Australia’s actions from, for example, the Bosnian or Kosovar evacuation programs.³¹² The precedents for such non-consensual transfers were not happy occasions: the post-1946 exodus of Jewish Holocaust survivors from Mediterranean ports on small boats

asylum” and also Conclusion No.87 (L) – 1999 which reiterates that “notions such as... ‘safe third country’ should be appropriately applied so as not to result in improper denial of access to asylum procedures...”

³⁰⁷ See above section “Interceptions at Sea - Conclusion” regarding CRC Articles 3, 19 and 22.

³⁰⁸ CRC, Article 20.

³⁰⁹ CRC, Articles 22.

³¹⁰ *Convention Against Discrimination in Education*, 429 UNTS 93, ratified by Australia on November 29, 1966 and by Indonesia on January 10, 1967.

³¹¹ Border Protection (Validation and Enforcement Powers) Act, Section 7A.

³¹² See E.U. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, 2001 O.J. (L 212/12), Article 26.1 — See also, Penelope Mathew, “Refugee Protection in the Wake of the Tampa,” *American Journal of International Law*, 96, July 2002. While no-one would suggest that the movement of asylum seekers from Australia to Nauru needed to avoid the pitfalls of ethnic cleansing which were in the minds of the Europeans, it is worth noting the value of consent in the context of any action claiming to be humanitarian in nature. There are reports that when the asylum seekers were first brought to Papua New Guinea and told they were not in Australia, many tried to hang themselves or cut themselves with glass. Ralph Calaban, local Manus resident who witnessed these violent protests: “They tried to climb the fence, hang themselves and cut themselves with glass. They then tried to pull the wire out of power points and kill themselves with that.” “PNG Broke Law by Taking Manus Asylum Seekers — *Foreign Correspondent Press Release, Australian Broadcasting Corporation*, April 17, 2002.

heading for British Palestine, where over 50,000 refugees were taken by ship to camps in Cyprus and interned, or the U.S. interdiction of Haitians and Cubans in the 1980s and their removal to Guantánamo Naval Base in Cuba,³¹³ which raised similar issues of “access to territory” as opposed to “access to asylum procedures,” and also similar concerns over evasion of due process requirements.

The first agreement to receive intercepted refugees between Australia and Nauru was due to expire after six months. It was converted into a Memorandum of Understanding³¹⁴ which provides for no termination date and which will continue as long as both parties are satisfied with the arrangements. As Nauru is not a signatory of the Refugee Convention, the Memorandum states that “any asylum seekers awaiting determination of their status or those recognized as refugees, will not be returned by Nauru to a country in which they fear persecution, nor before a place of resettlement is identified.” The Australian Department of Foreign Affairs (DFAT) explains that this Memorandum is binding, but less so than a bilateral treaty.³¹⁵ Were Nauru to return refugees or asylum seekers to the Middle East or Afghanistan, however, Australia as well as Nauru would be responsible.³¹⁶ Nauru, though not a signatory to the Refugee Convention, would be violating the customary international law prohibition against *refoulement*.³¹⁷

On October 11, 2001, the Australian government announced that it had signed another Memorandum of Understanding, this time with Papua New Guinea, to take intercepted asylum seekers from Australia just as Nauru was doing.³¹⁸ The arrangements with Papua New Guinea involved placing the asylum seekers on Manus Island, a remote equatorial and malarial island off its northeastern coast. While Papua New Guinea, unlike Nauru, is a party to the Refugee Convention, it has entered many reservations to that Convention³¹⁹ and lacks any national refugee determination procedures or framework for protecting or settling refugees.

³¹³ The 1903 U.S. lease for the Guantánamo Bay Naval Base gave the U.S. total jurisdiction over it, reserving only residual sovereignty to Cuba, yet the U.S. has always argued that Guantánamo is extraterritorial and that therefore its obligations under the Immigration and Nationality Act (INA) are not engaged. This government position was upheld by the Supreme Court’s decision in *Sale v. Haitian Centers Council, Inc.* [509 U.S.155 (1993)], which found that the interdiction of asylum seekers was based on INA powers while the asylum provisions of INA did not apply. The 11th Circuit of the Federal Appeals Court similarly found that military bases in foreign nations are not U.S. territory for the purposes of the INA [*Cuban American Bar Association v Christopher* – 43 F.3d 1412 11th Cir.1995]. Therefore Guantánamo is quite analogous to Australia’s introduction of “excised territories” which are both within its territory and jurisdiction, but removed from certain obligations of its Migration Act. President Clinton’s diversion of Guam-bound Chinese boats to Tinian Island (part of the Commonwealth of Northern Mariana Islands) in April 1999, where INS officers conducted asylum screenings but not within the statutory framework of the INA is also broadly analogous to the extraterritorial powers-without-duties role of DIMIA officials in Nauru.

³¹⁴ “Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues.”

³¹⁵ Human Rights Watch interview with Department of Foreign Affairs and Trade, Canberra, May 2002.

³¹⁶ Also, possibly CAT, Article 3.

³¹⁷ See note 11.

³¹⁸ Australia also considered sending the asylum seekers to East Timor, then under U.N. transitional administration; Fiji, where sanctions in place since the May 2000 coup were lifted as an incentive; Kiribati, Palau and Tuvalu, where the verbal request from Australia in November 2001 came only a month after Australia rebuffed a request from the Tuvaluans to accept some of their people in a special immigration program since their island is sinking under rising seas. See Oxfam Community Aid Abroad, *Adrift in the Pacific*, February 2002, p.21.

³¹⁹ Papua New Guinea has reservations to Articles 17.1 (wage earning employment), 21 (housing), 22.1 (public education), 26 (freedom of movement), 31 (refugees unlawfully in the country of refuge), 32 (expulsion) and 34 (naturalization).

The agreement with Papua New Guinea, also initially for six months,³²⁰ was subsequently extended until October 21, 2002, and has now been extended for another twelve months following intense diplomatic pressure on the newly elected government. Human Rights Watch has expressed its regret about the renewal of the agreement and reminded Papua New Guinea of its human rights obligations, which are violated by indefinite detention of asylum seekers, refugees and rejected asylum seekers.³²¹

Papua New Guinea, a party to the Refugee Convention, would be in violation of its obligations under international law were any refugee to be *refouled*. To date there have been no reported cases of *refoulement*. The physical safety of the refugees is also guaranteed by Australia in the event that for example, a coup or other civil conflict were to erupt in Papua New Guinea, Australia reportedly has evacuation plans for the detainees.³²²

The facilities on Nauru and on Manus Island, Papua New Guinea, have a maximum combined capacity of 2200 persons. On the Pacific sites combined, 1496 persons sought asylum, of whom 721 were rejected and 735 recognized as refugees. The remainder included one person still waiting for an assessment and others who withdrew their claims and departed. By late October 2002, 871 people remained on Nauru and 102 on Manus Island. Overall, on Nauru³²³ and Manus Island,³²⁴ as of September 18, just 19 percent of Afghans were recognized as refugees, compared to 80.9 percent of Iraqis. The overall recognition rate as of November 10, 2002, was 49 percent.³²⁵

Role of IOM

Within a week of Australia's asking it do so on September 12, 2001, IOM agreed to act as overall manager of the Pacific facilities, providing health care and other services. Neither Papua New Guinea nor Nauru are member states of IOM.

IOM's liability as a contractor is complicated by the fact that it subcontracts with a number of companies and individuals. For example, the perimeter security is subcontracted, but the guards are prohibited from using force against the asylum seekers.³²⁶ They are supposedly there to keep people out and to regulate arrivals at the camp gates.³²⁷ In both camps, Australian Protective Services hold special

³²⁰ "Memorandum of Understanding between the Government of Australia and the Government of the Independent State of Papua New Guinea, relating to the Processing of Certain Persons, and Related Issues."

³²¹ Letter from Human Rights Watch to Sir Michael Somare, Prime Minister of Papua New Guinea, October 3, 2002.

³²² Human Rights Watch interview with DIMIA Offshore Management, May 2002.

³²³ In Nauru, there are two facilities: Topside holds those disembarked from HMAS Manoora and State House holds those disembarked from HMAS Tobruk. As of early August 2002, 1083 detainees remained in two facilities, making the detainees nearly 10 percent of Nauru's total population. Of these, 330 were found to be refugees and 822 had their claims rejected. Only 7 percent of Afghans and 59 percent of Iraqis were recognized. As of September 26, 428 people out of 1,157 had been recognized as refugees through the processing on Nauru. Due to resettlement and return, a total of 719 persons remained in the facilities on Nauru as of November 10. Some 500 Afghans were scheduled for repatriation in November.

³²⁴ On Manus Island in Papua New Guinea, there is only the one facility, Lombrum Naval Base, for the predominantly Iraqi detainees, at which security is somewhat higher than in Nauru. As of early August 2002, 296 detainees remained, of whom 247 were recognized refugees and 89 rejected asylum seekers. As of September 18, 89.5 percent of all asylum seekers on Manus Island had been recognized as refugees. As of September 26, 273 people out of a total of 338 claims processed there had been accepted. Due to resettlement, returns and the transfer of some rejected cases from Papua New Guinea to Nauru, 93 people remained in the facility on Manus as of November 10.

³²⁵ Statistics provided by DIMIA to Human Rights Watch, November 20, 2002.

³²⁶ Major subcontractors of IOM include Eures Support Services, Chubb Security Pty Ltd in Nauru and Protect Security on Manus Island, Papua New Guinea.

³²⁷ The Memorandum of Understanding with Nauru lists IOM responsibilities, including: "good order and discipline of its centers," "escort" and "movement of asylum seekers" outside the facilities, and regulating who enters the facilities.

constabular powers under the laws of Nauru and Papua New Guinea. Although primary liability for incidents within the centers would be dealt with under local law, the entire arrangement is funded and directed by the Australian government.³²⁸

The detainees themselves realize that IOM is not a humanitarian or refugee protection agency and have protested its running the facility. On Manus Island, shortly after arrival, detainees tied placards to the fence of the camp pleading to be dealt with by UNHCR instead of IOM.³²⁹ One of the refugees who was on board the Tampa described the debate among the asylum seekers on whether to cooperate with their transfer to New Zealand and Nauru when the Australian government refused them entry in early September 2001: “Many thought IOM cared first for its own lucrative business and at second of asylum seekers, perhaps because of a good name. Some who had experienced it in Indonesia told us [that] as we would go under IOM management we would be forgotten by others.”³³⁰

IOM has told Human Rights Watch that it would not “do anything for any price,”³³¹ and has acknowledged that human rights considerations should guide its operations.³³² Nevertheless, although the IOM-run facilities in the Pacific are effectively detention centers and those detained include many persons in need of international protection who, as such, should only be detained in exceptional circumstances, IOM refuses to reconsider its involvement with this Australian deterrent program.³³³

Role of UNHCR

The government of Nauru, at the outset, requested the assistance of UNHCR with processing the asylum seekers. UNHCR under its mandate agreed, to process only those from the Tampa and the Aceng, the group delivered by the HMAS Manoora to Nauru. It did not wish to encourage Nauru to accept more refugees whom it believed were rightly Australia’s responsibility, and so declined on principle to do all the processing of claims. Australia undertook to meet all costs incurred by UNHCR in Nauru.³³⁴ When Papua New Guinea requested similar processing assistance under UNHCR’s mandate, UNHCR declined to provide it for the same reason as well as because Papua New Guinea is a party to the Refugee Convention.³³⁵

Role of DIMIA decision-makers

Those asylum seekers not processed by UNHCR on Nauru, and all those sent to Papua New Guinea, were therefore processed by Australian (DIMIA) officials. As of June 2002, there were forty-two such officials posted in the two countries. The officials did not apply Australian law, and were not formally seconded to the U.N. system or to the Papua New Guinea government. In other words, an asylum seeker on one of the Pacific sites had no recourse under any national law, whether Australia’s, Nauru’s or Papua New Guinea’s, for any alleged error by an official — even a decision that might be grossly unreasonable. In general, such officials were acting rather like those Australian officers who conduct resettlement

³²⁸ DIMIA Offshore Management referred to IOM actions as Australian actions, admitting that it was “very hard not to say ‘we’” when he meant IOM. Human Rights Watch interview with DIMIA Offshore Management, May 2002.

³²⁹ Oxfam Community Aid Abroad, “Adrift in the Pacific,” February 2002, p.14: cites article in the *PNG Post-Courier*.

³³⁰ Letter from detainee on Nauru, with authorization for Human Rights Watch to cite.

³³¹ Human Rights Watch with IOM Director General, Brunson McKinley, Geneva, October 2002.

³³² IOM Member States recognized, in May 1995, that the organization was called upon “to work towards effective respect for human rights,” and a resolution passed in November 1995 affirmed this objective to respect the human dignity and well-being of migrants, however IOM chooses not to look at the parallels between the legal conditions of detention on Nauru and Papua New Guinea and those found to be “arbitrary” by the UN Human Rights Committee on the Australian mainland.

³³³ Human Rights Watch interview with IOM Director General, Brunson McKinley, Geneva, October 2002.

³³⁴ Note Verbale of October 22, 2001.

³³⁵ Human Rights Watch interview with UNHCR Canberra, May 2002.

selection interviews in other countries, over whom the only scrutiny is that of the Australian Parliament.³³⁶

The circumvention of the Australian statutory framework, however, does not mean that Australia's human rights obligations can be evaded. A number of human rights standards, aside from the obligation of *non-refoulement*, apply to persons within a state's jurisdiction even while outside its territory, and Australian officials acting in Nauru and Papua New Guinea should uphold these standards.³³⁷

Export of arbitrary detention

Restrictions on freedom of movement amounting to detention

DIMIA has told Human Rights Watch that it considers the Pacific "processing centers" equivalent to "refugee camps around the world."³³⁸ It asserts that they cannot be detention centers because "it would be against IOM's constitution for them to manage a detention center,"³³⁹ even though IOM Headquarters denies that there is any such prohibition in its constitution or policy. UNHCR has expressed concern that there are severe restrictions on freedom of movement on the Pacific sites, and that this detention is also inconsistent with Article 31(2) of the Refugee Convention.³⁴⁰ It is a breach of Article 12 ICCPR³⁴¹ and, certainly for recognized refugees, of Article 26 of the Refugee Convention.³⁴² According to IOM, respect for the principle of freedom of movement is a primary requirement for a state's membership of that organization — a fact in apparent contradiction to IOM's role in this context.³⁴³

As the European Court of Human Rights has noted, the distinction between detention and restrictions on freedom of movement is "merely one of degree or intensity, and not one of nature or substance."³⁴⁴

³³⁶ Different sections of DIMIA described the legal standing of these officers acting extraterritorially in different terms: one section suggested that they acted under Section 75 of the Australian Constitution (that is, a Commonwealth Warrant) but could not say which Australian statute they were there in pursuance of [Human Rights Watch interview with DIMIA Border Protection, May 2002]; another section stated categorically that they fell under the jurisdiction of the Australian Human Rights Act and thereby the Human Rights and Equal Opportunities Commission of Australia (HREOC), though this remains as yet untested [Human Rights Watch interview with DIMIA Offshore Management, May 2002].

³³⁷ See, e.g.: Report of the UN Human Rights Committee – UNGAOR Supp 40, p.176, UN Doc A/36/40 (1981): Communication No. 52/1979 (29 July 1981), UN Doc. CCPR/C/OP/1 at 88 (1984) concerning *Delia Saldias de Lopez and Sergio Ruben Lopez Burgos v. Uruguay*. The Convention on the Rights of the Child, for example, applies to any child within a state party's jurisdiction, even those outside its territory. See CRC, Article 2.1.

³³⁸ The term "detention" triggers obligations to provide legal assistance and access to courts under the Constitutions of both Nauru and Papua New Guinea. However, these governments, like Australia, claim that it is not in fact detention but merely a restriction on freedom of movement defined by the terms of the "temporary entry permits" issued to the asylum seekers. See testimony from Mr Killesteyn for DIMIA to the Australian Senate Inquiry into a Certain Maritime Incident, Tuesday 16 April 2002, 812.

³³⁹ Human Rights Watch interview with DIMIA Offshore Management, May 2002. Also, letter from Frank Brennan SJ to Philip Ruddock, March 21, 2002: Quotes Ruddock's Chief of Staff, Ann Duffield, stating on 20 March 2002 that "IOM do not run and manage detention centers" — a statement which appears to be one of principle rather than just interpretation of fact.

³⁴⁰ Submission No.30, Senate Legal and Constitutional References Committee Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, p.8.

³⁴¹ Even if merely termed a restriction on freedom of movement, not detention, such a restriction is only permitted under human rights law if it is "provided by law" and "necessary to protect national security, public order, public health or morals, or the rights and freedoms of others." ICCPR Article 12.3. Any discrimination between nationals and non-nationals with regard to freedom of movement that does not meet these criteria is prohibited. Since neither Nauru nor Papua New Guinea have laws or regulations identifying their security or other specified concerns applicable to these circumstances, violating the right to freedom of movement.

³⁴² UNHCR quoted in "Pacific Solution inconsistent with convention: UN," *The Australian*, August 2, 2002.

³⁴³ Letter from IOM Legal Services to Human Rights Watch, received November 20, 2002.

³⁴⁴ See *Guzzardi v. Italy*, 39 Eur. Ct. H.R. (ser. A) 27 (1980). With this in mind, the Court held that Italy's self-styled "special supervision" restricting the applicant, Guzzardi, a suspected mafia member, to the island of Asinara in order

UNHCR defines detention as “confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.” While all “limitations on domicile and residency” may not amount to detention, UNHCR also suggests that “the cumulative impact of the restrictions” on freedom of movement may make the term “detention” appropriate.³⁴⁵ In light of these statements, Human Rights Watch concludes that the refugee camps/facilities on Nauru and Manus Island, Papua New Guinea, are places of detention.

DIMIA acknowledges that the freedom of movement of those residing in the camps is “substantially curtailed.”³⁴⁶ Asylum seekers who have attempted to leave have been arrested and put into Nauruan police cells for their “escape attempts.”³⁴⁷ In Nauru, since May 2002, IOM has taken detainees to the coast each day for swimming and shopping.³⁴⁸ These excursions may be a predictable way out of the detention center, but they require applying for a pass, and are always limited to short, heavily supervised visits to a few locations.³⁴⁹ In Papua New Guinea no excursions are permitted: for example, the Sabian Mendaeans were denied their request to leave at Easter so that they could perform their traditional baptismal ceremonies. On September 18, 2002, the Manus detainees broke down the fences of the facility in protest at their situation, but later returned peacefully since there was nowhere else for them to go on the island.

Private individuals who have tried to enter the Nauru facilities with written invitations from detainees have been denied entry.³⁵⁰ Not only have Human Rights Watch, Amnesty International and local human rights lawyers been denied access to the facility in Papua New Guinea.³⁵¹ So have Caritas Australia and even a local priest.³⁵² Australian politicians, Parliamentary delegations, journalists and two members of the Australian government’s Independent Detention Advisory Group have been allowed to visit, but the site has not yet been inspected by any body competent to judge whether it is a place of detention or to assess the lawfulness of that detention.³⁵³ IOM reports that the Australian Red Cross now has “unrestricted access” to the populations on both Manus and Nauru, after an initial period of at least

to prevent him committing a crime amounted to a “deprivation of liberty” under Article 5(1) of the European Convention on Human Rights.

³⁴⁵ See UNHCR, “Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers,” February 1999.

³⁴⁶ Human Rights Watch interview with DIMIA Offshore Management, May 2002.

³⁴⁷ A man who attempted to leave the premises in April was stripped naked and held in the local jail for almost a week, according to former detainees now living in New Zealand. Human Rights Watch interview No.50 with ex-detainees of Nauru now resettled in New Zealand, October 24, 2002.

³⁴⁸ IOM has hired and is training local Nauruans in lifesaving skills so that they can help serve as escorts/guards for these excursions. By that early date, the Nauruan trainees had already had to save the lives of two drowning Afghans.

³⁴⁹ This information is based on Human Rights Watch interviews with DIMIA Offshore Management and with selected IOM staff who wish to remain nameless.

³⁵⁰ Human Rights Watch interview with Kate Durham, July 2002.

³⁵¹ In March 2002, Human Rights Watch and Amnesty International requested permission from the Papua New Guinea government to conduct a site visit to the facility on Manus Island. The request was repeated several times in April. As of August 2002 no answer has been received. Australian human rights lawyers wishing to visit Nauru have received explicit refusals for visas in April and July 2002. Australian and British journalists attempting to enter the facilities and speak with the asylum seekers there have also been excluded or forced to film secretly. This reveals a fundamental resistance to independent scrutiny on the part of the governments involved and also on the part of IOM. It strongly suggests that these facilities are not “normal refugee camps.”

³⁵² Caritas Australia Submission to the Senate Select Committee on a Certain Maritime Incident.

³⁵³ *The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988), Principle 29 recommends regular visits by “qualified and experienced” independent observers to places of detention and the right of the detainees to communicate freely with visitors.

six months during which no such services were available, but has reportedly determined its family tracing services to be unnecessary to those on Manus.³⁵⁴

In certain contexts, even DIMIA and IOM themselves find it difficult not to make inadvertent references to the “detention centers” and “detainees” in the Pacific.³⁵⁵ In September 2002, an anonymous IOM employee in Nauru, troubled by the policy of his organization, wrote:

The camp becomes more and more a detention camp and IOM more and more obsessed with “security” issues. Since September 6 (the big [asylum] decision release) the APS [Australian Protective Security] is reinforced by about thirty or forty men and women...

Conditions amounting to “arbitrary detention”

The U.N. Human Rights Committee has held that arbitrary detention arises not only when there is no basis in law, but also where there are elements of inappropriateness, injustice, lack of predictability or disregard for due process of law.³⁵⁶ The U.N. Working Group on Arbitrary Detention’s Principles³⁵⁷ further clarify what makes detention arbitrary — for example, where the detention is indefinite,³⁵⁸ non-reviewable,³⁵⁹ where no written information on grounds or on remedy is provided,³⁶⁰ where communication with the outside world is obstructed,³⁶¹ and where it is unlawful.³⁶²

The conditions of detention on Nauru and Manus arguably contravene as many as six of these U.N. Principles and such detentions are therefore arbitrary. Detainees have no idea of the duration of their confinement, they have no means to challenge their detention before a court nor any other remedy, they have been informed of no grounds for it, and their detention is unlawful under the constitutions of both Nauru³⁶³ and Papua New Guinea³⁶⁴ because immigration detention in each case is permitted only in cases of unauthorized entry, whereas these asylum seekers’ received entry permits at the point of arrival.

Detainees have been severely restricted in their ability to communicate with the outside world. DIMIA states that detainees “can send and receive mail and faxes and make and receive telephone calls” and that incoming faxes will be passed along. Duties such as cooking and cleaning can earn coupons to be used to make international telephone calls, and “IOM will prepare and send e-mails on behalf of residents and check the messages of residents who have an e-mail address.” In fact, during the first three or four months of detention in Topside on Nauru, the Iraqis rescued from the Aceng testify that they were not allowed to make any phone calls, even to family members to say they were alive. Letters could be posted but those received in return were opened and read, refugees believe, by camp interpreters. Later, phone calls of approximately five minutes each were permitted to no more than ten detainees per day. The women who had husbands or other family in Australia were also allowed to send faxes, but the refugees

³⁵⁴ E-mail to Human Rights Watch from IOM Headquarters, October 7, 2002.

³⁵⁵ DIMIA Factsheet No.76 referred to “detainees” on the Pacific sites until this was pointed out to DIMIA.

³⁵⁶ See *Womah Mukong v Cameroon*, Communication No.458/1991, U.N. Doc. CCPR/C/51/D/458/1991, August 10, 1994.

³⁵⁷ See Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2000/4, December 28, 1999.

³⁵⁸ Principles 4 & 7.

³⁵⁹ Principle 3.

³⁶⁰ Principle 8.

³⁶¹ Principle 2.

³⁶² Principle 6.

³⁶³ Article 5.1 of the Republic of Nauru Constitution. Note parts 5.2-5.4 relate to the rights of persons in such detention, if lawful, including right to “consult in the place in which he is detained a legal representative of his choice”

³⁶⁴ Article 42 of the Papua New Guinea Constitution. Note part 42.2 relates to the rights of persons in such detention, if lawful, including the right to “communicate without delay and in private...with a lawyer of his choice” and to “be given adequate opportunity to give instructions to a lawyer of his choice in the place in which he is detained.”

deny that they have ever had access to e-mail within the camp.³⁶⁵ There is no form of communication from within the camp in which privacy, for example between a lawyer and a client, would be assured. One letter, written by an anonymous Afghan detainee on Nauru, stated:

The Australian government...are keeping us like prisoners and we are living in a very bad and sad situation. We don't have any means to contact our relatives and families and we are deprived of all our human rights.³⁶⁶

Conditions of detention for asylum seekers and refugees

UNHCR guidance makes it clear that, as a general principle, asylum seekers and refugees should not be detained, and that such detention may only be resorted to under exceptional circumstances.³⁶⁷ Wherever asylum seekers are detained, a variety of human rights standards are necessarily triggered.³⁶⁸

Asylum seekers and refugees are facing difficult conditions on Manus and in Nauru. Guideline No. 5 of UNHCR's *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers (Detention Guidelines)* and other human rights standards require that detained asylum seekers should have access to counsel and the ability to challenge the necessity of detention before an impartial decision maker. UNHCR's Guideline No. 10 requires that detained asylum seekers must be able "to make regular contact and receive visits from friends, relatives, religious, social and legal counsel."³⁶⁹ Both of these guidelines are violated by the conditions of detention in Nauru and Manus.

UNHCR states, "Minors who are asylum seekers should not be detained."³⁷⁰ This accords with the Convention on the Rights of the Child, which Australia, Nauru and Papua New Guinea have all ratified. In early May 2002, there were 363 children detained in the camps in the Pacific: 125 of Manus Island and 238 on Nauru.³⁷¹ IOM medical staff on Nauru reported that nearly all the children, including some thirty unaccompanied children, were showing signs of trauma such as nightmares and nervous twitches.³⁷² Lacking a protection mandate, IOM has not taken the specific needs of detained children into account.

³⁶⁵ Human Rights Watch interview No.50 with ex-detainees of Nauru now resettled in New Zealand, October 24, 2002. IOM argues that during recent supervised outings the asylum seekers can visit the Nauru Civic Center's Internet café and use the Internet there for a fee. Letter from IOM Legal Services to Human Rights Watch, November 20, 2002.

³⁶⁶ Letter from Nauru detainee to Ms. Fiona Johnston, July 2002, forwarded by recipient to Human Rights Watch, with permission to quote.

³⁶⁷ See UNHCR, "Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers," February 1999.

³⁶⁸ These include: UNHCR Excom Conclusion No. 44 (XXXVII); UNHCR, "Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers," February 1999; *The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988), including the right to receive an explanation on one's rights and how to exercise them (Principle 13), right to legal counsel (Principle 17) and the right to be visited by, and to correspond with, members of their family and others in the outside world (Principle 19); *The UN Standard Minimum rules for the Administration of Juvenile Justice ("The Beijing Rules")*.

³⁶⁹ Guideline No.10 (iv).

³⁷⁰ UNHCR, "Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers," February 1999.

³⁷¹ Oxfam Community Aid Abroad, "Still Drifting: Australia's Pacific Solution becomes a Pacific Nightmare," August 2002, p.15.

³⁷² As of June 2002. By November, there were 22 unaccompanied minors on Nauru, of whom only one had been recognized as a refugee. All of these are unaccompanied only in sense of no parents — all have some adult relative and are themselves between 16-18. According to DIMIA, IOM has satisfied itself that they are properly cared for.

Indeed, the duty of care for the unaccompanied adolescents on Nauru is unclear, because of the deliberately obscured liability and jurisdictional issues surrounding the running of the centers.³⁷³

UNHCR reminds governments that “During detention, children have a right to education...”³⁷⁴ The children aged six to sixteen in the Nauru centers can now, after much negotiation by an IOM staff member, attend the local school. On Manus, an Arabic-speaking teacher is provided for children and kindergarten.³⁷⁵ There are several forms of recreation offered, though it is reported that the detainees have tried to protest their arbitrary detention by a “strike” refusing to attend the school facility and other classes.³⁷⁶

The heat on both Nauru and Papua New Guinea is intense, the housing is roofed with corrugated iron in Nauru and consists of Nissen huts and converted shipping containers on Manus. For several months the refugees on Nauru were without electricity and could take salt-water showers only.³⁷⁷ The severity of the conditions has prompted individual detainees to demonstrate their psychological distress. DIMIA and IOM both claim that they do not keep statistics on incidents of self-harm, but that “swallowing shampoo or pins” has occurred.³⁷⁸

Conclusion

By establishing the “Pacific Solution,” Australia has taken its own policy of mandatory detention, a practice specifically found to be a human rights violation by the UN Human Rights Committee,³⁷⁹ and exported it to its less developed neighbors.³⁸⁰ Now Nauru and Papua New Guinea are complicit in arbitrarily detaining not only asylum seekers, including children, but also recognized refugees awaiting resettlement to third countries.

This is an unacceptable situation, to which UNHCR has a duty to object in the strongest terms. The U.N. Working Group on Arbitrary Detention should be granted access to visit detainees on the Pacific sites at the earliest opportunity in order to verify this apparent human rights violation.

³⁷³ In Australia, there is a general common law duty of care held by the Immigration Minister in relation to all people in detention, ensuring their physical safety and welfare. In addition, the Minister has a special duty of guardianship in relation to unaccompanied minors, as clarified by *X & Y v the Minister* (1988).

³⁷⁴ UNHCR Guideline 6 — referring, *inter alia*, to CRC, Article 28, of which Nauru, Papua New Guinea and Australia are all state parties.

³⁷⁵ See also: DIMIA Answers to Question on Notice from the Senate Select Committee Inquiry on a Certain Maritime Incident, June 13, 2002. There are no unaccompanied children in Manus because they were taken to New Zealand right at the beginning of the arrangements.

³⁷⁶ Caritas Australia’s Submission to the Senate Select Committee on a Certain Maritime Incident.

³⁷⁷ Human Rights Watch interview No.50 with ex-detainees of Nauru now resettled in New Zealand, October 24, 2002. See also: CMI Report, p.309.

³⁷⁸ Interviews with DIMIA Offshore Management, May 2002, and IOM doctor, posted in Papua New Guinea, July 2002.

³⁷⁹ See *A v Australia*, U.N. doc. CCPR/C/59/D/560/1993 (Human Rights Committee, April 30, 1997).

³⁸⁰ It should be noted that Australia has also attempted to export mandatory detention to New Zealand, which adopted a new detention policy for the asylum seekers from the Tampa group, though the New Zealand government insists that this policy change was driven more by the events of September 11 than Australian influence [Letter from NZ Department of Labour, dated 1 May 2002]. The legal basis for this detention was Section 128 of the Immigration Act 1987, but the policy was nevertheless found to be unlawful by the New Zealand High Court in June 2002, forcing the government to institute an automatic review of each detention order after 14-20 days [Operational Instruction from Border and Investigations NZIS, issued on 19 December 2001]. Before September 11, just 5 percent of asylum seekers were detained on arrival. After the new policy was introduced, detentions soared to 94 percent and almost all asylum seekers are still being detained despite Justice Baragwanath’s decision.

Concerns regarding refugee status determination procedures

The Australian Immigration Minister has declared, “Australia is scrupulous in ensuring that refugees are not *refouled*.”³⁸¹ This “scrupulous” avoidance of *refoulement* of course depends on the integrity of the refugee status determination procedures used in Nauru and Papua New Guinea.

Status determinations have been conducted in Nauru by UNHCR and DIMIA officers, and in Papua New Guinea by DIMIA officers alone. DIMIA officers use the UNHCR model and standards when conducting refugee status determinations. This allows it to evade Australia’s appeal system, so that decision-making is kept exclusively within the domain of the Department for Immigration. DIMIA officers do not view the cases they consider on Nauru and Papua New Guinea as “asylum applications.” They rely almost entirely on oral communication during the process. They discuss the asylum seeker’s claim, explore grounds for refugee protection, and disclose any potentially adverse inferences before a final decision is reached. DIMIA claims that the appeal is “essentially a fresh assessment” by a more senior departmental officer,³⁸² in which the same three steps are repeated. The officers then reach an administrative decision, which has no legal standing. Similarly, Australian asylum case law is not applied to these offshore decisions.³⁸³

As with the asylum seekers in Indonesia, those on the two Pacific sites are without access to legal advice including independent sources of country of origin information to help them prepare their cases. This deficiency is especially worrying in cases where their credibility may rest on failures of protection in countries of first asylum and transit, or on new risks of persecution that have only arisen, for example, since the fall of the Taliban. Instead, the asylum seekers are dependent on receiving country of origin information from the organizations detaining them (IOM) and deciding their fates (UNHCR/DIMIA).³⁸⁴ Very often smugglers had told them as to what to say, and there was no legal advice to counter this very dangerous “preparation.”³⁸⁵ Refugees recognized on Nauru and resettled in New Zealand told Human Rights Watch that they now understood what a refugee was under international law, but had not understood it clearly at the time of their interviews, despite the fact that UNHCR assessors provided the definition at the beginning of their interviews.³⁸⁶

Moreover, unaccompanied children and trauma victims on Nauru are particularly deserving of independent, specially trained³⁸⁷ representatives to assist them in presenting their claims before DIMIA and UNHCR.³⁸⁸ Many persons on the Pacific sites state that they are suffering from trauma from their ordeals in transit, when they were intercepted and forcibly transferred, and now in detention. Former

³⁸¹ Letter from Philip Ruddock to Kenneth Roth, Executive Director, Human Rights Watch, July 2002.

³⁸² See Senate Select Committee Inquiry on a Certain Maritime Incident Transcript, 830.

³⁸³ E.g., a recent Australian High Court decision on domestic violence and women as a social group would not be binding on the DIMIA decision makers in Nauru and Papua New Guinea. This case decided a contentious issue with regard to the element of “social group” within the Refugee Convention’s refugee definition. See *MIMA v Khawar* [2002] HCA 14 (11 April 2002).

³⁸⁴ The Afghan asylum seekers on board the Tampa were encouraged to leave their belongings on the fishing boat they abandoned so most of them lost their in documents, making verification of their nationalities and other elements of their claims all the more difficult. Report by John Pace of visit to Nauru camps in November 2001.

³⁸⁵ E-mail from IOM staff who had worked on Nauru, received by Human Rights Watch on November 15, 2002.

³⁸⁶ Human Rights Watch interview No.50 with ex-detainees of Nauru now resettled in New Zealand, October 24, 2002. New guidelines under development by UNHCR suggest that asylum seekers need to receive this information in advance of their interviews in order for it to be properly taken in and to allow them to prepare the presentation of their case.

³⁸⁷ In child development issues, but also in the Convention on the Rights of the Child.

³⁸⁸ UNHCR recommends: “A legal guardian or adviser should be appointed for unaccompanied minors.” UNHCR, “Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers,” February 1999, Guideline 6.

detainees from Nauru remember several compatriots who were too unnerved to present their claims coherently without assistance in either the first or second “appeal” interviews and so were rejected.³⁸⁹

Independent advisers would also be able to address concerns regarding, for example, biased or unprofessional interpreters. As it is, there is little recourse for complaints, as reported by one Afghan detainee on Nauru:

[H]ere is huge complaints of poor, partly cynical and even misleading translation and interpretation services of both DIMIA and UNHCR...Many tell me that interpreters did not listen to their whole stories or curtailed them partly, and even misled them — for example, asked them not to speak of their memberships of political parties by frightening them that this would make their cases more complicated.

Another Hazara asylum seeker, who was mistaken for a Tajik, recalled:

When I entered the interview room for the first time and sat in front of the interpreter, I spoke a Kabuli accented Dari [and so] the interpreter told me: “Well, you can have a strong claim. Let me make your case. You tell them: As I was a Tajik I was persecuted...” “No, no, I am a Hazara and I have genuine stories to tell. I don’t need to add something unreal.”...Then the interpreter collected himself, sighed and asked me to begin.

There are also reports that, contrary to UNHCR training for refugee status determination, “Interpreters are given an authority to recommend about character, language and accent of the asylum seekers.”³⁹⁰ UNHCR denies that such authority was ever formally or knowingly given and reports that no recommendations by interpreters are noted in any of the case files from Nauru.³⁹¹ Again, independent legal advisers in a national determination procedure would have been able to provide independent interpretation or investigate allegations that an interpreter played an improper role in influencing the case.

The quality of DIMIA decisions could be improved if detained asylum seekers had access to independent legal advice. DIMIA has stated that it is “not aware of any arrangements that would enable them to get [legal] assistance if requested,” but this statement fails to mention the fact that two visa applications from members of Australian Lawyers for Human Rights, offering free advice to detainees on Nauru, have been refused.³⁹² Former detainees from Nauru testify that when they asked IOM staff about the possibility of getting lawyers, they were told simply, “No way.”³⁹³ UNHCR has notified both the Nauruan and Australian governments on “several occasions” of its concern about lack of legal advice,³⁹⁴ but DIMIA cites the UNHCR status determination model, which involves no lawyers,³⁹⁵ as its

³⁸⁹ Human Rights Watch interview No.50 with ex-detainees of Nauru now resettled in New Zealand, October 24, 2002.

³⁹⁰ Letter from detained Afghan asylum seeker on Nauru, July 29, 2002 (with permission for citation by Human Rights Watch)

³⁹¹ Letter from UNHCR to Human Rights Watch, received November 20, 2002.

³⁹² DIMIA letter to Susan Harris, Australian Council for Overseas Aid, dated January 8, 2002: “The basis and process upon which any legal representation might be arranged is a matter for the individuals concerned.”

³⁹³ Human Rights Watch interview No.50 with ex-detainees of Nauru now resettled in New Zealand, October 24, 2002.

³⁹⁴ “Nauru says no to visas for lawyers”, *Sydney Morning Herald*, July 11, 2002

³⁹⁵ In certain countries, such as Egypt, Cambodia and Turkey, UNHCR has supported the provision of independent legal advice by a nongovernmental agency. There is no central policy on the issue, and has been dependent in most cases upon NGOs pushing for access rather than UNHCR actively exploring such options.

justification for this deliberate omission.³⁹⁶ Though IOM and DIMIA both frequently cite the Indochinese Comprehensive Plan of Action as a precedent for their operations in the Pacific today, they ignore the fact that asylum seekers processed under this plan in Hong Kong were provided legal assistance in presenting their claims.³⁹⁷

Offshore asylum seekers in Nauru and Papua New Guinea are thus disadvantaged compared to onshore applicants. Every asylum seeker in onshore detention is eligible for free legal advice under the Immigration Advice and Application Assistance Scheme (IAAAS) and many onshore asylum seekers may still depend upon their right, albeit limited, to appeal to an Australian court.³⁹⁸

In summary, those in arbitrary detention on Nauru and on Manus Island face further obstacles to protection resulting from the denial of legal counsel, both to advise on asylum claims and on challenging the lawfulness of detention, as well as from the absence of an independent appeal mechanism in the asylum process. For those subjected to the procedures in the Pacific, who previously triggered Australia's protection obligations and who may have come directly from places where their lives or freedom were threatened, less fair and full procedures are penalties within the meaning of Article 31 of the Refugee Convention.

Lack of durable solutions

Australia's reluctance to resettle

Prime Minister John Howard's declaration that "We will not allow these people to land in Australia. They do not have a legal right to come here"³⁹⁹ has led to obvious reluctance to resettle the refugees recognized in Nauru and PNG in Australia. The explicit opposition to settling even recognized refugees because they are secondary movers is what makes Australia's policy significantly different from, for example, U.S. processing on Guantánamo.⁴⁰⁰

After a refugee is recognized on an offshore site, Australia and UNHCR will try to find them a resettlement place somewhere in the world. This will be done, says DIMIA, "as quickly as possible and consistent with the government's strategy of ensuring that a preferred migration outcome for people who are secondary movers essentially does not end up being Australia..."⁴⁰¹ The government claims it is thwarting the people-smugglers for Australia to send refugees on Nauru to the United States or Sweden. This reasoning ignores the fact that many refugees in Nauru would be happier to go somewhere offering them permanent status, than to Australia, which is only offering three- or five-year visas.⁴⁰²

³⁹⁶ Australian Senate Additional Estimates Hearing, February 19 & 22, 2002: "In line with UNHCR arrangements, the process does not rely on the involvement of professional advisers to asylum seekers."

³⁹⁷ A group of lawyers with the Agency for Volunteer Service were permitted to counsel and write submissions for the Vietnamese in Hong Kong camps, at both first decision and appeal level.

³⁹⁸ In 2000-01, 67.5 percent of Afghan claims and 75.4 percent of Iraqi claims that had been rejected by the Refugee Review Tribunal succeeded on appeal to the Australian courts.³⁹⁸ It is also notable that the Refugee Review Tribunal has sent around half of the post-Taliban Afghan claims rejected by DIMIA within Australia back for reconsideration. Human Rights Watch interview with (anon) Refugee Review Tribunal member, July 9, 2002. Of the 977 persons whose claims were rejected in the Pacific, 214 were subsequently found to be refugees following review. DIMIA statistics provided to Human Rights Watch, November 20, 2002.

³⁹⁹ See Prime Minister quoted at www.dfat.gov.au/media/tampa_pm_doorstop310801.html.

⁴⁰⁰ The U.S. accepted those recognized as refugees into its territory without making them apply for resettlement and without suggesting that other countries should take responsibility for them. Some HIV positive cases were held in detention at Guantánamo for a long time, but eventually even these people were brought into the U.S. and afforded full and equal rights with other refugees.

⁴⁰¹ Senate Select Committee Inquiry on a Certain Maritime Incident Transcript, 816.

⁴⁰² Ironically, refugees in regions of origin, those whom Australia claims the policy is supposed to prioritize, will suffer if the other resettlement countries respond to Australian requests for "responsibility sharing" and take people from the Pacific sites, since it will be done at the expense of their annual UNHCR resettlement quotas. For example, New Zealand has agreed to take a greater proportion of its resettlement cases from the Pacific region, meaning that

Given that a number of those refugees held in the Pacific camps had previously entered Australian territorial waters or were on board Australian warships, Australia has a greater legal responsibility to them.⁴⁰³ A spokesman for the Australian Immigration Minister has erroneously stated that those awaiting resettlement on Nauru and Manus have “no greater claim on refugee resettlement than those waiting in camps in Africa and the Middle East in appalling conditions”⁴⁰⁴ and the Immigration Minister himself has rejected the idea that Australia should become a “guarantor of last resort” for the Pacific Solution refugees⁴⁰⁵ even though the Memorandum of Understanding with Nauru stated categorically that “Australia will ensure that no persons are left behind in Nauru.”⁴⁰⁶ Under oath to the Australian Senate, the Department of Foreign Affairs has stated that Australia does have a legal obligation to protect the refugees “if other countries are unable or unwilling to provide protection...”⁴⁰⁷

As of October 23, 2002, of the then 701 people found to be refugees under “Pacific Solution” processing, Australia had only accepted for resettlement 281 people, of whom 153 have close family links in Australia.⁴⁰⁸ As of November 18, Australia had resettled 310 and was considering a number of other cases. It is ultimately likely to take some 20 percent of those who have been recognized as refugees there.⁴⁰⁹ Meanwhile New Zealand, had resettled 202 people, with Sweden, Denmark and Canada also accepting small numbers. As of November 18, 2002, 526 persons had departed from Nauru and Manus for resettlement.⁴¹⁰ Had it not been for New Zealand, there would have been a significant shortfall in resettlement places.

Separation of families

Australia is primarily willing to resettle only those with immediate family members already in Australia. The number resettled will be deducted from the 4000 places allocated for resettled refugees from all regions of the world in 2002-03.⁴¹¹ The majority of those recognized on Nauru and Manus have family in Australia — 176 of 311 or 56 percent of the persons who received positive decisions in April 2002. In eighty-nine of those cases it was a spouse, child or parent.⁴¹² A DIMIA spokesman said that this just went to “underscore the whole point that this was a family-reunion movement, not a refugee

processing of cases from Africa (mainly Ethiopia and Somalia) have already been delayed as a result. E-mail from Adele King (NZ Refugee and Migrants Service) to Human Rights Watch, May 7, 2002. The Australia government claims that it will make up for this shortfall by using its own “places” — supposedly freed by the re-direction of the intercepted asylum seekers to the Pacific — to resettle more persons from other regions. DIMIA letter to Human Rights Watch, November 20, 2002. This elaborate and costly trading of destinations may not, in light of Human Rights Watch findings, have any beneficial impact upon the causes of refugee flight or secondary movement.

⁴⁰³ “Even though those recognized refugees are no longer on Australia’s territory, Australia’s obligations under the Refugee Convention continue to be engaged until a durable solution is found.” Statement by UNHCR, Submission No.30, Senate Legal and Constitutional References Committee Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, p.8.

⁴⁰⁴ Quoted in “Refugees still waiting on islands,” *The (Melbourne) Age*, September 19, 2002.

⁴⁰⁵ “Still No Vacancy for Tampa refugees,” *The Australian*, August 24, 2002.

⁴⁰⁶ “Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia for Cooperation in the Administration of Asylum Seekers and Related Issues.”

⁴⁰⁷ Submission 44, Senate Foreign Affairs, Defence and Trade Inquiry into Australia’s Relationship with Papua New Guinea and Other Pacific Island Countries, p.34.

⁴⁰⁸ As of September 2002. See CMI Report, p.321.

⁴⁰⁹ Most of these persons have been granted either three or five year visas. The five year visas are available to people who had not landed on one of the excised territories. A few people have also been resettled on temporary “humanitarian stay visas” which are not dependent on Convention refugee status and are of a duration to be determined by the Immigration Minister. CMI Report, p.xliv.

⁴¹⁰ DIMIA Statistics, received by Human Rights Watch on November 20, 2002.

⁴¹¹ DIMIA Press Release, “Minister announces humanitarian program intake for 2002-03.”

⁴¹² DIMIA Answers to Question on Notice from the Senate Select Committee Inquiry on a Certain Maritime Incident, 13 June 2002

movement,”⁴¹³ as if two motivations — the push of ineffective protection and the pull to a particular destination — cannot coexist and as if having a family and wanting to put it back together is nothing but an immigration scam. In fact, far fewer of those persons whose asylum claims were rejected in the first round of decisions, only thirty-seven, had immediate family ties in Australia.

Of these people with immediate family ties, Australia had resettled forty-two Iraqis (one man, thirteen women and twenty-eight children) from Papua New Guinea and eighteen from Nauru by the end of July 2002. Another forty-nine refugees with immediate family links and 115 with less immediate family links living in Australia remained in the Pacific.⁴¹⁴ As of late September, only those women with husbands in Australia had actually departed Nauru for resettlement in Australia, while the others accepted in principle by Australia remained in the offshore detention centers. This contrived separation of refugee families is certainly a penalty, as it flagrantly disregards the principle of family unity and would never have arisen if those intercepted had been admitted into the Australian mainland asylum system.⁴¹⁵ UNHCR has called on the Australian government to not only reunify refugee families split between Australia and the Pacific sites, but also to grant derivative status to the spouses and minor children of refugees recognized in Australia so that they can be immediately reunited rather than having to undergo a separate refugee status determination and possible forced return if rejected.⁴¹⁶

Return with signed consent

On May 16, 2002, the Australian Immigration Minister signed a Memorandum of Understanding with Afghanistan’s Interim Administration on the voluntary return of Afghan refugees and asylum seekers.⁴¹⁷ On May 23, 1,014 Afghans in detention in mainland Australia, Christmas Island and Nauru were offered a reintegration assistance package of A\$2000 per adult or a maximum of A\$10,000 (US\$5,640) per family — the equivalent of five years’ wages for the average Afghan. The detainees were given 28 days to accept the offer. For people who had borrowed huge sums to pay smugglers to get to Australia, and who had mistakenly bargained on no more than three months in detention before they would be allowed to work, the offer was both tempting and also worthless to them — those interviewed by Human Rights Watch said that they would have to hand the reintegration packages straight over to their smuggler-creditors upon their return. The first seven men to accept the money and fly back to Kabul had been in Australian detention centers for two to three years. The first six returnees departed from the detention centers on Nauru in late July.

As of October 8, 2002, 410 detainees on Nauru (398 Afghans, six Iranians, three Sri Lankans and three Iraqis) had accepted the reintegration assistance package offered by Australia, prompted, some said, by mass depression following the sudden and unexplained death of a young detainee in September. As of November 18, a total of 179 persons had voluntarily repatriated from the two Pacific sites.⁴¹⁸ IOM refers to the “Pacific Solution” as entering its “endgame” phase,⁴¹⁹ despite the fact that security and human rights conditions in Afghanistan remain grim. The voluntary nature of returns from conditions of prolonged arbitrary detention is always highly questionable, but IOM, hired to manage the detention centers on Nauru and Papua New Guinea, is not the organization to ask that question.⁴²⁰

⁴¹³ “Pressure to take refugees with tie to Australia,” *The Canberra Times*, June 18, 2002.

⁴¹⁴ “Pacific Solution refugees arrive in Australia,” *Australian Broadcasting Corporation*, July 31, 2002.

⁴¹⁵ UNHCR has expressed concern with regard to these human rights violations. Submission No. 30, Senate Legal and Constitutional References Committee Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, p.7

⁴¹⁶ UNHCR RO Canberra statement to the Senate Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, p.48.

⁴¹⁷ DIMIA Press Release, May 16, 2002.

⁴¹⁸ DIMIA Statistics, received by Human Rights Watch on November 20, 2002.

⁴¹⁹ Human Rights Watch interview with IOM Executive Director, Brunson McKinley, Geneva, October 2002.

⁴²⁰ “IOM Policy concerning its assistance to unsuccessful asylum seekers and irregular migrants returning to their country of origin,” 91st Session, March 29, 1996, para 13, explains that IOM “considers that voluntariness exists

In one case, IOM removed four asylum seekers (three Sri Lankans and one Pakistani) from Nauru to their countries of origin without giving UNHCR more than overnight notice. The incident led to an informal but high-level agreement between IOM and UNHCR that all returns must in future be counseled by UNHCR, prior to deportation, to check that the decision to withdraw their claims and to return is genuinely voluntary.⁴²¹

Forced return or indefinite detention

Neither UNHCR nor IOM⁴²² will effect forced deportations, and the terms of the Memoranda of Understanding specify that it is Australia's responsibility effect any removals on behalf of Nauru and Papua New Guinea. This again raises questions about the legal accountability of Australian officials' actions outside of Australian territory, especially where use of force is involved. DIMIA has stated that "if possible, we will return directly from the sites" or, if not, they will use powers enacted in March 2002 to allow them to transfer deportations through the Australian mainland without the rejected asylum seekers being able to challenge their detention or deportation under Australian law.⁴²³

Iraqi refugees reported that shortly before the first decisions were handed down on Nauru in April, an Australian official visited the camps and told them very firmly, "Anyone rejected should go back to Iraq." Unaware whether or not the Australian government had the ability to enforce such deportations without their consent, the detainees experienced intense anxiety and depression from this meeting. One refugee, recognized by UNHCR and resettled from Nauru to New Zealand, continues to be very concerned for the mental health and physical protection of his brother, who arrived in Nauru twenty days later and had his case rejected by a DIMIA decision maker.⁴²⁴ There were reports of violent clashes involving protesting Afghan rejected asylum seekers, including women and young children, and large numbers of the Nauru police following the April round of decisions.⁴²⁵

In March 2002, the Migration Act was amended⁴²⁶ to allow certain non-nationals to be brought from a "declared country" such as Nauru or Papua New Guinea into mainland Australia, for reasons ranging from medical evacuation to deportation, without allowing them to apply for protection under the Act. Such "transitory persons" move as if within a bubble of individual excision: they are barred, for example, from challenging their deportation before Australia's Refugee Review Tribunal or courts for at least six months.

when the migrant's free will is expressed at least through the absence of refusal to return, e.g. by not resisting boarding transportation or not otherwise manifesting disagreement." — This is a very pragmatic definition, but one which unfortunately puts emphasis on the resistance of the returnee rather than on IOM ensuring certain preconditions are met. The emphasis is on behavior in the moments before boarding a plane, rather than on the freedom of the decision-making process that leads up to signing a statement of volition.

⁴²¹ Human Rights Watch interviews with UNHCR and DIMIA Offshore Management, May 2002.

⁴²² "IOM Return Policy and Programmes: A Contribution to Combating Irregular Migration," 74th Session, MC/INF/236, 5 November 1997. Note the distinction between refugee repatriations and "return programmes for irregular transit migrants."

⁴²³ It is possible, however, that a rejected asylum seeker on Manus Island truly desperate to prevent his deportation could try to claim asylum from Papua New Guinea as a signatory of the Refugee Convention, even though they have no national determination procedures to deal with this eventuality. See Question raised at Senate Legal and Constitutional Committee, February 22, 2002.

⁴²⁴ Human Rights Watch interview No.50 with ex-detainees of Nauru now resettled in New Zealand, October 24, 2002. Note that for several months the brothers were kept in separate camps on Nauru despite their pleas to IOM to be held together.

⁴²⁵ Human Rights Watch interview No.50 with ex-detainees of Nauru now resettled in New Zealand, October 24, 2002.

⁴²⁶ By the Migration Legislation Amendment (Transitional Movement) Act 2002.

The fate of rejected asylum seekers who cannot be returned is unclear. Despite the fact that some of them have close family members who have received refugee status in Australia, this group is most likely to end up in indefinite detention on the excised territory of Christmas Island. They will need to be transferred there at some point if Papua New Guinea and Nauru hold Australia to its assurances that no one shall remain on their territories after processing is completed.⁴²⁷

Human Rights Watch believes that those whose claims have been rejected should be offered humanitarian protection in the Australian community until conditions in their countries of origin allow for return with safety and dignity.

Conclusion

The arbitrary detention of recognized refugees in Nauru and Papua New Guinea demonstrates how international protection requires more than *non-refoulement* and a fuller observance of human rights than is stated explicitly in the articles of the Refugee Convention.

UNHCR has stated that Australia has a “special responsibility” to find durable solutions for all the recognized refugees in the Pacific sites.⁴²⁸ This follows from the fact that the “Pacific Solution” deliberately deprived them of an available durable solution, namely, admission and settlement in Australia.

The Australian government recognizes that where refugees have entered Australian territory, including territorial waters or an Australian naval ship, its obligations under the Refugee Convention are engaged.⁴²⁹ Beyond *non-refoulement*, Australia also has “special obligation” to see that these refugees are ultimately able to access a legal status affording human rights. This implies access to resettlement if return to their countries of origin in safety and dignity remains impossible.

In summary, those refugees who were intercepted and transferred to the Pacific sites are being penalized for their secondary movement and attempt at illegal entry, by means of arbitrary detention in remote locations, lesser procedural safeguards in relation to their status determinations, and also by the imposition of unnecessary obstacles to the enjoyment of asylum and family life.

Mandatory detention of asylum seekers in Australia

Detention as a penalty

The current Australian policy of mandatory detention for all asylum seekers who are unauthorized entrants⁴³⁰ constitutes a penalty because it is an unnecessary restriction upon the rights of refugees.

⁴²⁷ The Australian Department of Foreign Affairs (DFAT) speaks only of commitment to the “expectations” of the Pacific states that the people will not remain on their territory after refugee status determination. The Memorandum of Understanding states that “Australia will ensure that no persons will be left behind in Nauru.” And “Australia will ensure that appropriate transportation and travel documents are arranged for all persons whose status has been determined.” In January 2002 the Australian Immigration Minister spoke of Nauru being cleared of the asylum seekers by May 2002, and President Harris reported that this was the deal he had struck with his own landowners. See Oxfam Community Aid Abroad Submission to the Senate Select Committee Inquiry on a Certain Maritime Incident.

⁴²⁸ UNHCR Canberra, January 2002 statement.

⁴²⁹ Letter from Philip Ruddock to Kenneth Roth, Executive Director, Human Rights Watch, July 2002. See also: DIMIA Answers to Question on Notice from the Senate Select Committee Inquiry on a Certain Maritime Incident, 13 June 2002.

⁴³⁰ “Mandatory detention” as applied in Australia means the automatic detention of every unauthorized entrant, including asylum seekers for the duration of their application procedures and appeals, without any effective means of appeal or review. All illegal entrants and overstayers are detained, regardless of circumstances or likelihood of absconding. The Australian government now claims that only detention on the mainland is mandatory, whereas detention on “excised offshore places” is discretionary because the person arriving there would only be detained if

Introduced in 1992, Australia's policy has a longer history than that of the other penalties and deterrents discussed in this report⁴³¹ and applies to all illegal entrants, including those coming directly from their country of origin and by air. A full discussion of the human rights violations inherent in Australia's regime of mandatory detention is therefore beyond the scope of this report.⁴³² Nevertheless, the policy is included in this report because deterring secondary movement has become the primary political justification (alongside national security concerns) for the continued use of mandatory detention, in the face of intense domestic and international criticism.

Many of the asylum seekers held in detention centers on the Australian mainland are of the same profile and traveled by the same routes as those held in Nauru and Papua New Guinea, returned to Indonesia, or otherwise penalized for their secondary movements. In 2000-2001, 8,401 people were held in immigration detention in Australia, of whom 1,103 were children.⁴³³ As of July 29, 2002, 1,434 adults and 184 children⁴³⁴ remained in six onshore (mainland Australia) detention facilities, of whom almost half were Afghans, Iranians and Iraqis.⁴³⁵ By mid-September, there were 1,180 detainees onshore.

Violations of Australia's human rights obligations

Immigration detainees in Australia, including asylum seekers, have no effective means of judicial or administrative review by which to challenge the decision to detain them. Nor is there a mechanism to subsequently review the necessity for continued detention. Detention lasts for an indefinite period, and many individuals have been detained for years, the longest for five-and-a-half years; children have been born and raised in detention centers for the first three or four years of their life). The Australian government has been unwilling to use alternatives to detention, which shows that detention is not solely a measure of "last resort."⁴³⁶

not moved to an "offshore processing center" in Nauru or Papua New Guinea, which they do not categorize as detention. DIMIA, "Unauthorized Arrivals and Detention: Information Paper," February 2002.

⁴³¹ In 1994, the Australian government stated: "We want to send a very clear message to anyone who is intending to come to Australia illegally by boat with no valid claim that the doors are closed." Quoted in Fr Frank Brennan SJ, "Australia's Refugee Policy – Facts, Needs and Limits," 2002, p.3.

⁴³² Human Rights Watch visited Villawood Detention Centre, near Sydney, in April 2002 and also spoke with approximately a dozen former detainees in Australia, now recognized as refugees, as well as with asylum lawyers who have worked for many years inside detention centers. For more in depth research and commentary upon Australia's mandatory detention regime, however, Human Rights Watch refers to Amnesty International's 1998 report, "A Continuing Shame — The Mandatory Detention of Asylum Seekers" (AUS/POL/REF); "For Those Who've Come Across the Seas" (May 1998) by the Human Rights and Equal Opportunities Commission of Australia, in conjunction with more recent information available on HREOC's website; "Standards of Accountability in the Administration of Prisons and Immigration Detention Centres," a speech by Prof. Richard Harding, Inspector of Custodial Services of Western Australia, Perth, 30 October 2001; and "Damaging Kids: Children in DIMIA Immigration Detention Centres" by Western Young People's Independent Network and the Catholic Commission for Justice Development and Peace, Melbourne, May 2002. See also "Human Rights and Immigration Detention in Australia," Report of Justice P.N. Bhagwati, Regional Advisor for Asia and the Pacific of the UNHCHR, based on his mission to Australia, 24 May to 2 June 2002.

⁴³³ Amnesty International Australia, Factsheet 09 — Mandatory Detention of Asylum Seekers.

⁴³⁴ During 2001-02, a total of 1,486 asylum-seeking children spent time in detention.

⁴³⁵ In 2000-01, 7,993 "unlawful non-citizens" were held in immigration detention, with the number in facilities at any one time at around 3,000. The top three nationalities were Afghan 2,196 or 27.7 percent, Iraqi 1,034 or 13.2 percent, and Iranian 545 or 7 percent. As of March 1, 2002, 415 Iraqis, 399 Afghans, and 368 Iranians remained in onshore detention. DIMIA table provided to the Australian Senate Additional Estimates Hearing.

⁴³⁶ CRC, Article 37(b). See also: Rule 2 of the *UN Rules for the Protection of Juveniles Deprived of their Liberty*, and Rule 179(c) of the *UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)*. Note: "Bridging visas" are the only means of release, by non-reviewable and non-compellable discretion of the Immigration Minister. They can be applied to persons from one of five "vulnerable groups," but in practice they are rarely used. These were introduced in 1994 to answer criticisms that the regime was too rigid, but still falls far short of human rights law requirements or UNHCR guidelines.

These factors led the UN Human Rights Committee in *A v Australia*⁴³⁷ to emphasize that “every detention decision should be open to periodic review so that the justifying grounds can be assessed” and found that the absence of this review right constituted arbitrary detention.⁴³⁸ Australia failed to comply with this Human Rights Committee opinion, however, and its policy remains in violation of international standards.⁴³⁹

The major documented human rights concerns raised by Australia’s detention policy are extended periods of indefinite detention; detention of recognized refugees; indefinite detention of rejected asylum seekers who cannot be returned;⁴⁴⁰ lack of proper judicial review of the detention; disregard for the principle of family unity; detention of children including unaccompanied children; lack of information provided to detainees about their rights; the use of “separation detention” with lack of access to legal counsel; lack of a proper independent monitoring and accountability mechanism; and the punitive use of criminal prisons to detain protesting asylum seekers, including child asylum seekers.

Conditions in Australian mainland detention centers are extremely difficult. Three out of six remaining detention centers are in remote, desert locations, making contact with lawyers and family much more difficult. Detainees are held in prison-like conditions.⁴⁴¹ A new facility called Baxter Immigration Detention Facility was opened near Port Augusta, South Australia, in 2002. It has a 1200-volt outer electric fence, movement detectors between the fences. Each of the nine compounds has its own perimeter fence and steel gates. There are no windows, so detainees can only see the sky from the central courtyard. Detainees are locked in their rooms every night from 9:00 p.m. to 8:00 a.m. Some people who have been transferred to Baxter from the equally remote center at Curtin have not had visitors or seen anyone but the guards of Australian Correctional Management for over two years.⁴⁴² Such conditions of detention

⁴³⁷ See *A v Australia*, U.N. doc. CCPR/C/59/D/560/1993 (Human Rights Committee, April 30, 1997). See also, more recently, a similar decision in *Mr. C v Australia*, U.N. doc. CCPR/C/76/D/900/1999 (Human Rights Committee, November 5, 2002).

⁴³⁸ ICCPR, Article 9 provides that “No-one shall be subjected to arbitrary arrest or detention” and CRC, Article 37(b) provides that “No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.” See, in particular, ICCPR, Article 9(4) concerning the right of any detainee to “take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention” and CRC, Article 37(d) concerning a detained child’s right to “challenge the legality of deprivation of his or her liberty before a court or other competent, independent and impartial authority.” The UN Working Group on Arbitrary Detention similarly states that “the detaining authorities must assess a compelling need to detain that is based on the personal history of each asylum seeker” and that “an absolute maximum duration for the detention of asylum seekers should be specified by law.” UN Working Group on Arbitrary Detention, “Report on the visit of the WGAD to the United Kingdom on the Issue of Immigrants and Asylum Seekers,” UN Doc E/CN.4/1999/63/Add.3 (December 18, 1998) and the Human Rights Committee as a whole has made similar comments [General Comment 8, UN Human Rights Committee, 16th session].

⁴³⁹ *Inter alia*: UNHCR, “Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers,” February 1999 and UNHCR Excom Conclusion No. 44 (XXXVII). The fact that Australian policy does not conform to UNHCR guidelines in terms of either the permissible grounds for detention, the procedural safeguards or the conditions of detention is explained in “Australia’s detention policy assessed against UNHCR’s Guidelines on Detention,” UNHCR Newsletter No.1/2002 — UNHCR Regional Office for Australia, New Zealand, Papua New Guinea and the South Pacific. See also, *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988).

⁴⁴⁰ The scope for this particular abuse has been somewhat curtailed by the Federal Court of Australia decision in *Al Mazri v MIMA* [2002] FCA 1009 (August 15, 2002) and subsequent case law.

⁴⁴¹ Commonwealth Ombudsman, “Report of an Own Motion Investigation into the Department of Immigration and Multicultural Affairs’ Immigration Detention Centres,” March 2001: “immigration detainees appear to have lesser rights and are held in an environment which appears to involve a weaker accountability framework” than criminals in correctional facilities.

⁴⁴² E-mail to Human Rights Watch from visitor to Baxter Immigration Detention Facility, October 2002.

exacerbate the impact of previous torture, arbitrary detention or trauma in countries of origin, first asylum and transit, as well as creating fresh trauma, especially in children.

Human Rights Watch interviewed one fifteen-year-old Iraqi boy at Villawood Detention Centre who, over the course of two years in detention, had witnessed numerous suicide attempts and instances of extreme violence and self-mutilation. While in Curtin Detention Center, he had been among those forcibly moved using plastic handcuffs “with serrated teeth cutting backwards” and he was put into an isolation cell with his father for ten days. After this treatment he was diagnosed as suffering from depression and, in December 2000, threatened to kill himself by slitting his throat. One Tuesday in May 2001, in Port Hedland, he and his elder brother claim they were beaten by guards. The following week, they were randomly caught in a raid by Federal Police officers and taken, along with other alleged “trouble-makers,” to spend seventeen days in state jail. In the face of all these traumatic experiences, however, his main preoccupation when interviewed by Human Rights Watch was his education: He said it was the lack of adequate educational facilities at Villawood, “just once class with one teacher for all ages together,” which really made him feel suicidal because he saw years of his life passing by and “taking my future along with them because they take my chance of education.”⁴⁴³ This boy, who has been in Australia so long that he speaks good English with a strong Australian accent, described himself as “like a person who is drowning and is holding themselves up by one arm, but my arm is getting tired and it will soon be easier to just let go.”⁴⁴⁴

The future of detention in Australia

Now Australia is building a new detention facility on its excised territory of Christmas Island, which is due to open in January 2003. It will have a 1200-person capacity. DIMIA says, “it would be foolish to think there will never be another influx of boat people”⁴⁴⁵ and it may be used if the Pacific sites have to be emptied. It will provide better physical conditions than existing mainland centers or the previous makeshift detention facility previously used to hold people on Christmas Island before taking them to Nauru or Papua New Guinea.⁴⁴⁶

The legal conditions of detention there, however, will be less protective than on the mainland because asylum seekers there will be beyond the powers of the Migration Act and so will not be provided the right to apply directly for protection visa in Australia. UNHCR has expressed concern at the lack of formal procedures for the assessment of refugee status in excised places such as Christmas and Cocos Islands.⁴⁴⁷ DIMIA told Human Rights Watch that Section 256 of the Migration Act still obligates them to afford people in immigration detention on Christmas Island “all reasonable facilities to obtain legal advice or take proceedings in relation to their detention...”⁴⁴⁸ Respect for this obligation should be closely monitored, and independent legal advice extended for the purpose of assisting refugee status determination as well as for challenging the detention.

⁴⁴³ When questioned about this case, DIMIA told Human Rights Watch that that level of educational provision was “just the same as a school in a small rural Australian town” Human Rights Watch interview with DIMIA, May 2002. However, the local area educational inspector has stated that the level of provision inside Villawood falls far below any normal standard and urges DIMIA to let the detainee children attend the local school just across the road.

⁴⁴⁴ Human Rights Watch interview, No. 38, Villawood Detention Centre, Sydney, April 6, 2002.

⁴⁴⁵ Human Rights Watch interview with DIMIA, May 2002.

⁴⁴⁶ “Howard Flies Refugees In — Quietly,” *The Courier Mail*, August 1, 2002: Reference to 56 people remaining in detention on Christmas Island. See Australian Human Rights and Equal Opportunities Commission (HREOC) press release on Christmas Island in December 2001: “From interviews with detainees in the Sports Hall [on Christmas Island] it was clear to the HREOC officers that detainees have not been informed of the legal rights which accrue to everyone who has been taken into detention and deprived of their liberty, such as the right to contact appropriate consular and diplomatic representatives and to obtain legal advice about their situation. They also had not been informed of the changes to the Migration Act 1958 and what this might mean...”

⁴⁴⁷ “Offshore system splits refugee families: UN,” *Sydney Morning Herald*, August 7, 2002.

⁴⁴⁸ DIMIA letter to Human Rights Watch, received November 20, 2002. See Section 256 of the Migration Act 1958.

New section 494AA of the Migration Act bars proceedings before a court relating, among other things, to the lawfulness of the detention of an “offshore entry person” in a place like Christmas Island. In letter to Human Rights Watch, the Australian Immigration Minister claimed that this would not constitute a violation of ICCPR Article 9(4) because another subsection of the Act retains the constitutional jurisdiction of the Australian High Court over such questions.⁴⁴⁹ In light of the lack of legal assistance for a detainee in bringing such a case, however, this residual right to appeal to the High Court is not an effective remedy.

Detention on Christmas Island is, like the *zones d’attente* in certain European airports,⁴⁵⁰ subject to human rights requirements relating to all administrative detention, and may be considered arbitrary if there are elements of inappropriateness, injustice, lack of predictability or disregard for due process of law.⁴⁵¹

Refugees arriving without authorization — by implication, many refugees making secondary movements — are now excluded from protection in Australia even as they stand on Australian soil. Potentially, a person could be intercepted, taken to Christmas Island for as little as a few hours, and thereby excluded from applying for asylum in Australia even while they were detained for months on the Australian mainland. If recognized, refugees on Christmas Island or another excised territory will have to apply, from within Australia, to be resettled in Australia. Before this penalty is imposed on them, they are given no chance to rebut the presumption that they previously enjoyed or had access to effective protection elsewhere.

Withholding rights and solutions: Temporary Protection Visas

The Australian government penalizes refugees who have made secondary movements by refusing to grant them permanent status. Instead, Australia grants them a Temporary Protection Visa (TPV) with a limited duration of stay.⁴⁵² To use Temporary Protection as a penalty in this way contrasts sharply with the practice of other states as well as with the guidance of UNCHR.⁴⁵³ According to these precedents and authorities, Temporary Protection should be reserved for use in mass influx situations where it is given to asylum seekers prior to any determination of refugee status.

Hierarchy of refugee protection in Australia

The 1999 Temporary Protection Visas

After October 1999,⁴⁵⁴ but before the September 2001 change in law, refugees arriving in Australia without permission to enter were immediately transferred to detention, where they remained while officials heard their applications for asylum. Even after being recognized as a refugee under the Refugee Convention, applicants were given a Temporary Protection Visa,⁴⁵⁵ which lasted only three years. If the same refugees traveled to any of a number of other industrialized countries during this same period, and

⁴⁴⁹ Letter from Philip Ruddock to Kenneth Roth, Executive Director, Human Rights Watch, July 2002.

⁴⁵⁰ See *Amuur v France*, European Court of Human Rights (1996) 22 EHRR 533.

⁴⁵¹ See *Womah Mukong v Cameroon*, Communication No.458/1991, U.N. Doc. CCPR/C/51/D/458/1991, August 10, 1994.

⁴⁵² “The visa regime changes in the new legislation are designed to address very deliberately the phenomenon of secondary movement of refugees.” DIMIA, “Principled Observance of Protection Obligations and Purposeful Action to Fight People Smuggling and Organized Crime: Australia’s Commitment,” 2001.

⁴⁵³ See e.g., Excom Conclusions No.15 (XXX) – 1979, No.19 (XXXI) – 1980, No.21 (XXXII) – 1981, No.23 (XXXII) – 1981, No.68 (XLIII) – 1992, No.71 (XLIV) – 1993 and No.74 (XLV) – 1994.

⁴⁵⁴ Amendments to Migration Regulations, Part 4 Protection Visas, subclass 785. In fact in operation since 24 August 1999 – Of 504 boat people who arrived between August-October 1999, 439 were recognized as Convention refugees but only 25 were granted permanent protection visas. This was achieved by freezing the processing of the Afghan claims until after the new legislation had been passed. See Peter Mares, *Borderline* (Sydney, 2001), p.25.

⁴⁵⁵ Visa subclass 785.

were determined to be refugees under the Convention, they would have been granted permanent permission to remain.⁴⁵⁶

As of May 31, 2002, 8,413 TPVs of three years' duration had been granted. Of these, 3,290 are held by Afghans and over 90 percent are held by Afghans and Iraqis.⁴⁵⁷

The September 2001 Temporary Protection Visas

Now, if the same refugees enter Australia's migration zone under the September 2001 legislation,⁴⁵⁸ they not only will be detained and receive a temporary visa if recognized, but also will be prevented from ever obtaining permission to remain permanently in Australia if they have previously "resided, for a continuous period of at least 7 days, in a country in which they could have sought and obtained effective protection: (a) of the country; or (b) through the offices of UNHCR located in that country."⁴⁵⁹ Under this so-called "seven-day rule," they would only be able to apply for successive temporary visas, each lasting three years.

Nearly every refugee will fail the application of this "seven-day rule."⁴⁶⁰ Since the Australian government appears to regard the mere presence of UNHCR in a country such as Indonesia to be "effective protection," most of the refugees interviewed by Human Rights Watch will be blocked from ever attaining permanent status.

The seven-day rule is also to be applied to many of the holders of 1999 TPVs when their three-year visas expire.⁴⁶¹ The first of the 1999 TPVs expire in November 2002.⁴⁶² At that point, these previously recognized refugees have to re-prove that they have a well-founded fear of persecution, in light of present circumstances.⁴⁶³ If re-recognized, each refugee will then be subjected to the "seven-day rule."

The two "off-shore" Temporary Protection Visas

The September 2001 legislation also created two new visa subclasses for "offshore" resettlement applicants: "Secondary Movement Offshore Entry – Temporary" (447) and "Secondary Movement

⁴⁵⁶ It is the long experience of settlement services in Australia, the U.S. and Europe that refugees who are held in detention for more than a few weeks after arrival find it much harder to integrate after recognition. The introduction of TPVs for all former-detainees in 1999 did exactly the opposite – it denied certain support services to former detainees and prevented them from starting new lives with certainty.

⁴⁵⁷ "Australia May Send Refugees Home as Temporary Visas Expire," Australian Associated Press, June 11, 2002.

⁴⁵⁸ Schedule 2, Migration Regulations 1994 (as amended).

⁴⁵⁹ Regulation 866.215 of the Migration Regulations 1994 (as amended).

⁴⁶⁰ The "seven-day rule" creates a perverse incentive to transit first countries of asylum as quickly as possible (in other words, under seven days) rather than attempting to seek effective protection there – an outcome diametrically opposed to the Australian government's stated objective.

⁴⁶¹ Previously, holders of post-1999 TPVs were told that they had to apply for a permanent protection visa within thirty months, but they were also told that their application would be considered no sooner than thirty months and that it would cost them A\$30 to lodge the application, so some people postponed doing so. Most, however, did lodge applications because they needed to do so in order to register for Medicare. Now that the law has changed without notification, those who did not apply for a permanent visa are barred from doing so, and so feel very bitter about this. Of the 6,535 people released from detention onto TPVs, 2,785 had not applied for permanent protection visas before the cut-off date of September 27, 2001. See National Council of Churches in Australia (NCCA) Statement of Concern, Exec. Doc.No.6.3(B) 1/3/2.

⁴⁶² DIMIA Factsheet No.68

⁴⁶³ Australia's refugee appeal body, the Refugee Review Tribunal, may review this type of decision [Robert Illingworth (DIMIA) to the Senate Legal and Constitutional Committee, February 2002] but the Australian courts may not, except in very exceptional circumstances. The "privative clause" of the Judicial Review Act 2001 has excluded effective judicial review in nearly all immigration-related cases. The government is unable to remove the original jurisdiction of the High Court, but this merely throws an additional burden onto it, especially since asylum seekers without legal aid will have to go before it without representation.

Relocation – Temporary” (451).⁴⁶⁴ The first is a three-year visa, available to those applying from a “declared country” and meeting certain criteria equivalent to those used to select cases under Australia’s Special Humanitarian Program.⁴⁶⁵ People who enter Australia on such visas may *never* apply for a permanent protection visa, but can only reapply for another three-year temporary visa when their first one expires. This visa will be the one available to “offshore entry persons” meaning those who landed at an excised territory such as Christmas Island, before being transferred elsewhere. It will therefore be the visa type most commonly granted to refugees resettled from Nauru or Papua New Guinea.

The second “offshore” TPV is a five-year visa, designed for people resettled from transit countries like Indonesia, that is, the “second safe country they enter” or “a country other than your home country or country of first asylum.”⁴⁶⁶ The criteria for granting this visa are extremely similar to those above, but in this case the person may apply for a permanent protection visa after four and a half years (54 months) or a shorter period specified by the Immigration Minister. This visa will be available to all those in places like Indonesia, Papua New Guinea and Nauru who are not “offshore entry persons” because they never made contact with Australian land (of the present detainee population, in other words, those who were on board the Tampa and SIEVs 1,2 and 3).⁴⁶⁷

The seven-day rule also affects secondary movers in other regions applying for resettlement to Australia. So, for example, someone who spent more than seven days in Iran before moving to Jordan and then applied for resettlement from there might be granted only a three-year visa rather than a permanent one. This provision is an extension of a longstanding skepticism by the Australian government to resettling what they call “out of region” cases, for example, a Somali man applying for resettlement from Iran. The Australian government would not bar his application, but will look twice as closely at it, asking, “Why has he moved? Are we encouraging secondary movement if we accept this case?” If he moved, in their opinion, because refugee status determination or resettlement works faster from the second country of asylum, he may well be denied a place in order to deter asylum seekers with this motive.⁴⁶⁸

Lack of appeal against the “seven day rule”

Newly arriving refugees, refugees applying for resettlement, and many of those holding expired TPVs from 1999 will be asked whether they did or did not reside for seven days in a purportedly safe country before reaching Australia. For a refugee actually in Australia, there will be no appeal against a decision that he did so, except for the Immigration Minister’s right to exercise his discretion in certain

⁴⁶⁴ Migration Amendment (Excision from Migration and Consequential Provisions) Act 2001.

⁴⁶⁵ The Minister will consider the applicant’s connection with Australia, the extent of the persecution or discrimination, the extent of the “risk” faced by the applicant, Australia’s capacity to provide asylum and “(e) whether there is any suitable country available, other than Australia, that can provide for the applicant’s stay and protection from persecution, discrimination, victimization, harassment or serious abuse.” The applicant also has to be no threat or prejudice to national security or interests, and meet government criteria relating to character and public health.

⁴⁶⁶ See DIMIA Form 842.

⁴⁶⁷ In this way, the people on Nauru and PNG can be divided into two groups (“offshore entry persons” and others) who are eligible for different levels of protection under Australian law. The intention is presumably that those who did not even attempt to enter Australia illegally are rewarded with an extra two years’ worth of protection. In practice, the distinction relies upon chance events relating to the physical condition and position of vessels at sea.

⁴⁶⁸ Human Rights Watch interview with UNHCR Canberra, July 2002.

“very compelling” cases⁴⁶⁹ and the very limited and difficult to exercise constitutional right to appeal to the High Court.⁴⁷⁰ Those applying from abroad will have no mechanism for appeal.

Human Rights Watch is gravely concerned that there is no opportunity for refugees to present the reasons why they were not “effectively protected” in the country or countries where they spent more than seven days.⁴⁷¹ If the Australian government insists on proceeding with this system, then individual circumstances as well as general country conditions must be considered to distinguish “irregular movers” from those making secondary movements because they had not yet reached a place of effective protection.

UNHCR advises that “no strict time limit can be applied to the concept of ‘coming directly’” in Article 31 of the Refugee Convention.⁴⁷² That advice is flagrantly disregarded by Australia in introducing the “seven-day rule.” Australia’s rigid approach could cause refugees to make false statements about the directness and speed of their flight, when in fact their cases would be better served by a full explanation of the human rights abuses, sometimes amounting to persecution on grounds of nationality, which they may have suffered while living in places like Quetta, Peshawar or Qom over a period of years.

Terms and conditions of Temporary Protection Visas

All “onshore” and “offshore” TPVs, whatever their durations, have the same set of entitlements and rights afforded under Australian law.

The Australian government stated, “The differential treatment of asylum seekers and refugees on the basis of, for example, secondary movement or forum shopping or delayed application for asylum can be a reasonable and responsible approach to the problem of people-smuggling and abuse of asylum systems” but then went on to add the proviso that this is the case only if reception standards “meet the core Convention obligations.”⁴⁷³ They have also told Human Rights Watch that they are confident the Australian TPV status brings rights “in excess of international legal obligations.”⁴⁷⁴ Both Human Rights Watch and UNHCR⁴⁷⁵ have found, however, that refugees’ core rights are being violated by two key conditions of the Australian TPVs.

⁴⁶⁹ However, in a meeting with Human Rights Watch in October 2002, the Australian Minister for Immigration stated that he would be very reluctant to exercise this discretion: “The reason for the rigidity is that if you expressly provide a broad based discretion to officers, the situation unwinds that it becomes a general waiver for everybody.” When confronted with one of the cases showing strong reasons for involuntary secondary movement given earlier in this report, Mr Ruddock refused to state whether such a case would, in principle, meet his standard of a “compelling” exception to the “seven day rule.”

⁴⁷⁰ This latter residual right is not really an option for refugees who will be denied legal aid (under the Immigration Advice and Application Assistance Scheme (IAAAS)) to challenge such a decision. Refugees, especially those who have been denied access to English classes because they are TPV holders, are unlikely to be able to present the facts of their cases to either the Minister or the High Court in a legally persuasive form, and there will be few relevant facts on their files since initial refugee interviews usually were not focused on conditions in countries of asylum or transit. Nor will there be any way for Parliament or any other independent body to scrutinize the countries deemed by DIMIA to have offered effective protection.

⁴⁷¹ Due to recent curtailment of judicial review, Australian courts now may be precluded from interpreting such terms as “effective protection” and “reside” and DIMIA told Human Rights Watch that it had no intention of issuing interpretative guidance on such matters to decision makers. Human Rights Watch interview with DIMIA, May 2002.

⁴⁷² UNHCR, “Guidelines and Applicable Criteria and Standards relating to the Detention of Asylum Seekers,” February 1999, para 4.

⁴⁷³ DIMIA statement on “Reception,” 3rd Meeting, Track 3 of UNHCR Global Consultations, 27-28 September 2001.

⁴⁷⁴ Human Rights Watch interview with DIMIA, May 2002.

⁴⁷⁵ Submission No.30, Senate Legal and Constitutional References Committee Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, p.5.

Denial of family unity (reunification)

The principle of family unity is denied by the terms of the TPVs. Refugees with TPVs are not allowed to apply to bring any family members into Australia, even their own minor children or spouse, and so are certain to be separated from their family for a minimum of three or five years.⁴⁷⁶ If they are subjected to the successive TPV regime, they may be separated from even their immediate families forever.

Family unity is a fundamental principle, though not a binding obligation, of human rights, humanitarian and refugee law, as affirmed in the Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons and also in a wide array of Excom Conclusions.⁴⁷⁷ The Convention on the Rights of the Child, in particular, requires that “family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.” The complete ban on family reunification applications from TPV holders does not respect this state duty. The UNHCR *Guidelines on Reunification of Refugee Families*, furthermore, state that in situations where members of the same family have reached temporary asylum in different states, their reunification in the state best placed to offer protection should be facilitated.⁴⁷⁸ Australian policy obstructs UNHCR’s humanitarian work in this area. Family separation is often the greatest hardship of a refugee endures; a host state should not intentionally exacerbate this suffering.⁴⁷⁹

Many refugees believe a central purpose of the Australian TPV legislation was to impede family reunion arrivals. In fact, Human Rights Watch’s findings suggest that the 1999 law created a new market for people-smugglers, one mainly consisting of women and children trying to rejoin their husbands and fathers in Australia. The number of women-at-risk in urban refugee situations of the Middle East and South Asia increased, where wives and mothers found they could not follow their husbands and sons and so were stranded in precarious protection situations.

The Australian government stopped differentiating statistically between children and adults as of June 30, 2001⁴⁸⁰ so it is difficult to demonstrate conclusively that the family reunion restrictions of TPVs created more child smuggling-victims, but the high proportion of women and children arriving by boat in late 2001 can be inferred from comparing the ratio of “cases” to “people” listed by DIMIA as arriving.⁴⁸¹ Several Human Rights Watch interviews also confirmed this situation to be typical,⁴⁸² including one interview with a mother and son who almost drowned on SIEV-X in their attempt to join a TPV holder in Australia. It must be emphasized that in no case was the desire for family reunion the primary reason for

⁴⁷⁶ Prolonged restrictions on the right to family reunion under the temporary protection regime may mean that children reach the age of maturity and therefore become disqualified as a dependent, even if the visa holder is one of the lucky few later able to pass the “seven day rule” and gain a permanent visa.

⁴⁷⁷ A number of international instruments stress the fundamental importance of family unity. See, e.g.: *Convention on the Rights of the Child*, entered into force Sept. 2, 1990, 1577 U.N.T.S. 3, Article 10, para. 3 (“applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner”); *International Covenant on Civil and Political Rights*, entered into force Mar. 23, 1976, 999 U.N.T.S. 171, Article 23, para. 1 (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”). See also: UNHCR Excom Conclusions No.1 (XXVI) – 1975 para (f), No.9 (XXVIII) – 1977, No.24 (XXXII) – 1981, No.84 (XLVIII) – 1977, No.85 (XLIX) – 1998 paras (u)-(x), and No.88 (L) – 1999.

⁴⁷⁸ UNHCR, “Guidelines on Reunification of Refugee Families,” 1983, para 9(d).

⁴⁷⁹ Torture and trauma counselors state that most of their TPV clients need to use their counseling sessions to deal with the ordeal of ongoing family separation. Human Rights Watch interview with STARTTS counselors, Melbourne, April 2002.

⁴⁸⁰ DIMIA could not produce this figure at the request of Human Rights Watch in May 2002, but acknowledged that the impression of a high proportion was probably correct. Their explanation of this, however, was that it was a ploy on the part of “irregular migrants” to try to avoid detention by bringing their children.

⁴⁸¹ See DIMIA Factsheet No.81.

⁴⁸² See, e.g., Human Rights Watch interviews Nos.6, 11 and 16.

leaving the first country of asylum, which was invariably based on a lack of legal status and/or threats to their safety, though family ties may have determined the final destination of their flight.⁴⁸³

Violation of right to travel documents

The other core right denied by the terms of the Australian TPVs is the right to travel documents and hence the right to leave and re-enter Australia. The two “offshore” TPVs may be given to both Convention refugees and other persons fleeing generalized violence and human rights abuses.⁴⁸⁴ For Convention refugees, the denial of travel documents is a violation of Article 28 of the Refugee Convention, as well as paragraph 13(a) of the Schedule to the Refugee Convention, which obliges a state to readmit the holder of a travel document to its territory.⁴⁸⁵ For those denied family reunion, this condition of the TPV is particularly harsh since it prevents them from visiting relatives living in other countries of asylum.

Social welfare implications

DIMIA states that TPV holders receive “the same basic taxpayer-funded package of services which is available to unemployed members of the Australian community,”⁴⁸⁶ but Human Rights Watch found this statement to mask a range of significant restrictions on their access to social welfare.⁴⁸⁷ Most importantly, the word “temporary” on their documentation makes them easy targets for discrimination, because employers and landlords are nervous about trusting them with jobs or rental leases. As a result most TPV holders are unemployed and have been found to be living below the poverty line.⁴⁸⁸ Australian churches and charities are picking up the task of assisting the destitute.⁴⁸⁹

Under a Bill before the Australian Parliament at the time of writing,⁴⁹⁰ TPV holders would be required to search for jobs at the same rate as Australian nationals in order to continue qualifying for welfare payments, regardless of their likely language difficulties and lack of contacts in the community.

⁴⁸³ See, e.g., An elderly Afghan woman, stranded in Indonesia, has a husband, daughter and son who are all refugees in Australia. The daughter is an Australian citizen who has lived there for ten years, while the husband is only on a Temporary Protection Visa. Human Rights Watch interview, No. 14, Mataram, Indonesia, April 15, 2002. See also: A woman whose parents, grandparents and siblings are all living in Sydney since fleeing from Afghanistan six years ago. Her mother has twice applied for her to come to Australia legally, via the family reunion channel, but her applications were rejected without explanation, pushing her daughter to attempt to enter illegally. Human Rights Watch interview, No. 31, Mataram, Indonesia, April 19, 2002.

⁴⁸⁴ Both offshore TPV subclasses only allow entry on one occasion, precluding any travel overseas for the visa holder (clauses 447.511 and 451.511).

⁴⁸⁵ Australia had a reservation entered to the Refugee Convention with regard to Article 28 until as late as 1971.

⁴⁸⁶ DIMIA, “Unauthorised Arrivals and Detention: Information Paper,” February 2002, p.10.

⁴⁸⁷ TPV holders cannot access mainstream social welfare payments but are given a Special Benefit which is paid at a substantially reduced rate; they are given no access to state-subsidized English language classes like other refugees; nor to the Migrant Resource Centers which provide orientation and assistance with finding employment to permanent refugees. They are forced to pay overseas student fees for higher education. Though they qualify for rent assistance and can apply for emergency or other public housing, they are not eligible, like other refugees, for assistance with the initial costs of setting up a household.

⁴⁸⁸ Catholic Commission for Justice Development and Peace, “Forgotten People - Asylum in Australia,” Discussion Paper No.10, Melbourne, February 2001.

⁴⁸⁹ Such groups also shoulder the burden of caring for asylum seekers (mostly air arrivals) in the community who are denied social security. See Hotham Mission Asylum Seeker Project, “Evaluation & Report Feb 2000-Feb 2002,” which refers to having to deal with the vast numbers of TPV releasees who have no access to public housing support services and were often left in front of back-packer hostels with only enough money for a few days’ accommodation.

⁴⁹⁰ Family and Community Services Legislation Amendment (Special Benefit Activity Test) Bill 2002, amending the Australian Social Security Act 1991.

Violation of duty to facilitate assimilation

When Australia subjects refugees to a perpetual temporary status through its TPV-renewal scheme, it will violate Article 34 of the Refugee Convention that obliges states to “as far as possible facilitate the assimilation and naturalization of refugees.” The legislation ignores those parts of the Refugee Convention aimed toward assisting refugees to return to a situation of national protection in a new country, if not their own, as soon as possible. It also diverges from UNHCR policy⁴⁹¹ and the practice of other states, which accept that if return remains impossible after a number of years, the protection must be made permanent and full Refugee Convention rights granted. The new European Union Directive on temporary protection, for example, recognizes that after a maximum duration of three years, all persons under temporary protection must be allowed to apply for permanent protection or otherwise provided with a durable solution.⁴⁹²

Expiry and the prospect of forced return

As explained above, refugees who are recognized under the Convention but who made secondary movements, will be forced to repeat their status determination every three years. When a TPV is set to expire, if the refugee is considered to no longer have a well-founded fear of persecution, he will have twenty-eight days after the primary decision is handed down and then will be considered to be in Australia unlawfully. He may appeal to the Refugee Review Tribunal and his visa may be extended until this decision is handed down. After that, he is liable to be detained and removed if he does not leave voluntarily.⁴⁹³

Renewal of TPVs can therefore be denied under less stringent standards and procedures than the Refugee Convention “cessation” inquiry, used to determine when refugee status has ended for a particular individual.⁴⁹⁴ The standards and procedures for cessation of refugee status are more rigorous than the standard for granting protection, but the Australian approach disregards this deliberate shift in the weighting of the burden of proof.⁴⁹⁵ As a result, a deep sense of insecurity affects the TPV-holders’ lives from day to day.⁴⁹⁶

A boy from Afghanistan, of Tajik origin from Herat, now living alone with his younger brother in Melbourne, felt that his status put pressure on him to make a decision regarding return: “Our biggest worry now is that we have only a temporary visa and so we are in limbo. The government are changing the legislation under our feet day by day and we have no information.” The Afghan refugee community tells them news about what is happening in Afghanistan but he and his brother do not know what to believe: “We are very uncertain about what is true and what is not. Are we going to be sent home? Can you tell us? And if we stay here, are we going to be temporary forever?”⁴⁹⁷ Since the introduction of TPVs in October 1999, 1,693 children have been issued them, of whom 285 are unaccompanied children

⁴⁹¹ UNHCR has observed: “[I]f the link between asylum and solutions is lost, a refugee is condemned to a lifetime of marginalization and dependency.” UNHCR, “Policy and Practice Regarding Urban Refugees: A Discussion Paper,” October 1995.

⁴⁹² EU Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

⁴⁹³ DIMIA Factsheet No.68

⁴⁹⁴ The “cessation clauses” in the Refugee Convention define conditions when refugee protection is no longer needed, while its “exclusion clauses” define when an individual does not deserve protection.

⁴⁹⁵ DIMIA believes the procedure to be directly analogous, however: “There is no reason why a State should not be able to require a refugee to re-establish their need for protection — indeed the Convention clearly envisages this with the inclusion of Article 1C, the cessation provision. It is reasonable in the context of determining whether the durable solution of local integration will be offered, as is the test as to whether the refugee made an unnecessary secondary movement.” Letter from DIMIA to Human Rights Watch, received November 20, 2002.

⁴⁹⁶ The perpetual insecurity is not dissimilar from that of the eighteen refugees (mostly Ambonese) in Australia on “safe haven visas” which have been periodically extended seven times since being granted on April 7, 2000.

⁴⁹⁷ Human Rights Watch interview, No. 42, Sydney, Australia, April 21, 2002.

released from detention into the community.⁴⁹⁸ For these children, the Australian Immigration Minister is their legal guardian and adjudicator of their status — a clear conflict of interests.

One Iraqi Kurdish woman explained she felt tricked because the law was changed without warning in September 2001. She suddenly found she was expected to have applied for a permanent visa before September 27, 2001, even though she had previously been informed that she had thirty months to do so. She lodged her application for renewal of her visa only in February 2002, which means that she will never be able to bring her parents or brother over from Iran. “My biggest worry is that we will be sent back when our visa expires. It is a kind of permanent insecurity. No one will give us a legal visa: not the Iranians, not the Australians...I have never had a stable condition in my whole life, since I was born until now [she is 27]. I am frightened that my child will have the same life...”⁴⁹⁹

At first refugees and their advocates were relatively sanguine about the threat of revocation or cancellation of TPVs. Then came September 11 and the U.S.-led military action in Afghanistan. Now there is evidence of TPV holders flying illegally to New Zealand and applying for asylum there to escape the risk of forced return.⁵⁰⁰ The Australian Immigration Minister has made belligerent statements with regard to forced returns to Afghanistan being inevitable and even imminent.⁵⁰¹ One unaccompanied Afghan boy, released from Curtin Detention Centre to live on a TPV, expressed his anxiety:

I used to cry all the time because I didn't know what had happened to my family when America invaded. I was vomiting blood from hyperacidity, which came from stress. I was so relieved when they said on television that the Taliban had left, but then Mr Ruddock said that we would have to go back, which was like a nightmare. After I heard this I found it much harder to concentrate on my studies.

He is afraid of return despite the ousting of the Taliban because he remembers life before they came to power: “When my father was not at home my mother had to put big sticks across the door and she would stay awake all night to watch over us.” His family was mixed Tajik/Hazara, so they were persecuted by all sides because of their ethnicity: “We were caught between two sides. And now the Pashtuns are like a snake that has been bitten...just waiting for revenge.” While he was detained in Curtin, he wrote a letter to the Red Cross asking for family tracing services after a representative visited the center, but he never heard back and has had no news of his family for two years now. “Sometimes ahead is even worse than looking back,” he concluded, “I would like to find some sort of permanent security from which I can make a true decision, not a forced decision.”⁵⁰²

During September and October 2002, DIMIA sent a letter to Afghan TPV-holders asking them to explain why they should be allowed to remain in Australia once their visas expire. Given the deeply unstable situation in Afghanistan almost a year since the fall of the Taliban, as documented in several Human Rights Watch reports, it is extremely worrying that individuals, including unaccompanied children, are expected to justify their need for continued refuge in this way, without any access to legal aid to assist in making their cases.

⁴⁹⁸ DIMIA statistics provided to the Australian Senate Legal & Constitutional Committee, February 2002

⁴⁹⁹ Human Rights Watch interview, No. 43, Sydney, Australia, April 21, 2002.

⁵⁰⁰ Human Rights Watch was told by one New Zealand refugee lawyer that she has dealt with approximately six successful claims from Algerians who have transited Australia in the past two years, as well as similar claimants from Iraq and Somalia. This is possible because, as yet, there is no domestic legislation in New Zealand relating to either the “safe third country” or “secondary movement” concepts.

⁵⁰¹ With regard to people turning down the cash reintegration package: “They may think that, if they wait, in some way we will allow them to stay, and that won't be happening.” Quoted in “Ruddock cash offer to get rid of Afghans”, *Sydney Morning Herald*, May 24, 2002. Philip Ruddock has also stated that there “will come a time when forced returns will occur.” “Afghans face forced return,” *The (Melbourne) Age*, June 16, 2002.

⁵⁰² Human Rights Watch interview, No. 41, Sydney, Australia, April 21, 2002.

Refugee status should properly be cancelled only by applying the cessation clauses in the Refugee Convention. They require that the country of origin has undergone a change of a “profound and enduring nature.”⁵⁰³ They are generally invoked only after UNHCR has made a declaration of cessation, but even that should only create a presumption which individuals should be able to challenge in an effective manner. The cessation clauses are negative in character and exhaustively enumerated.⁵⁰⁴ Any cancellation procedures that try to circumvent or fail to meet these standards are in violation of Australia’s international obligations.

Australia also rejects the category of refugees defined in the Convention who require permanent protection because they experienced such gross human rights violations.⁵⁰⁵ Human Rights Watch interviewed at least one Hazara woman who made it very clear why she never intended to return to her country, whatever had changed:

The memory of living in fear of the Taliban is too strong. For example, there was one time when there were forty of us hiding in complete silence in a darkened house for three months. The men sometimes snuck out, but we women could never go out. The door was locked from the outside and men brought food at night and threw it through the window for us. Another time, my husband hid in a single room for two years. He never went out and I and the other women had to watch the house in shifts. We hid him away in a pit under the stairs if the government forces ever came near the house. These memories still give me nightmares and I could never return to the place where they happened. Even if any poor African country would accept me, I would rather go there.⁵⁰⁶

Conclusion

The Australian government states its position unequivocally: “[S]econdary flows disadvantage those in refugee camps who are often in greater relative need of assistance. Australia recognizes the greater need of such refugees by granting them permanent residence and providing a range of settlement services to enable them to fully participate in the Australian community.”⁵⁰⁷

The new TPVs, conversely, are a penalty within the meaning of Article 31 of the Refugee Convention because they unnecessarily and unreasonably withhold several other basic rights from recognized refugees. There is no evidence to suggest that an average refugee making a secondary movement will have less “need,” either materially or in terms of protection, than a refugee remaining in

⁵⁰³ See Excom Conclusion No.69 (XLIII) – 1992; the UNHCR Note on Cessation Clauses [UN Doc. EC/47/SC/CRp.30 (1997)] and Guidelines on the Application of the Cessation Clauses [UNHCR/1OM/17/99], which identify some relevant indicators for determining whether this is the case, including: democratic elections, significant reforms to the legal and social structure, amnesties, repeal of oppressive laws, dismantling of repressive security forces, general respect for human rights (the right to life, to liberty of the person, to non-discrimination, to freedom of expression, assembly and association, to fair trial, independence of the judiciary and access to courts, etc). There should be a functioning governing authority and administration, infrastructure sufficient to support basic livelihood and guarantees of basic physical security for the foreseeable future.

⁵⁰⁴ UNHCR, “Handbook on Voluntary Repatriation,” 1996.

⁵⁰⁵ See Refugee Convention, Article 1C, clauses (5) and (6). DIMIA suggests the proviso contained in these clauses applies only to those determined to be refugees before 1951, specifically Holocaust survivors, and ignores the guidance of the UNHCR *Handbook on Refugee Status Determination* (paragraph 136) which suggests that this proviso can apply to other refugees today who have suffered particularly gross human rights violations. DIMIA, *Interpreting the Refugees Convention – an Australian contribution* (Canberra, 2002), pp.16-17. The Immigration Minister retains his discretion to waive the TPV rule in such cases, but DIMIA has expressed the view that such cases would be extremely rare. Human Rights Watch interview with DIMIA, May 2002.

⁵⁰⁶ Human Rights Watch interview, No. 16, Mataram, Indonesia, April 15, 2002.

⁵⁰⁷ DIMIA, *Refugee and Humanitarian Issues: Australia’s Response* (Canberra, 2001).

first countries of asylum. Indeed, they may have more dire “protection need” and so have been compelled to flee from more than one country.

Apart from Article 31, the Refugee Convention obligations that are violated by Australia’s use of TPVs include the right to travel documents, the right to have cessation of refugee status under the Convention assessed in accordance with specific standards, and the right of refugees to have their integration facilitated in the absence of a voluntary repatriation as a durable solution. This Australian policy also disregards the fundamental human rights principle of family reunification.

It is true that refugee status should only be a temporary phenomenon, but that does not imply return to a country of origin in all cases. The status should be temporary in the sense that it is transformed into another, more secure immigration status if return in safety and dignity remains impossible. This is to recognize that refugees are human beings, not units to be “warehoused” for years on end.

VIII. FUTURE DIRECTIONS

Weakening commitment to international law

While the Universal Declaration of Human Rights enshrines the right to seek and enjoy asylum,⁵⁰⁸ it is true that the Refugee Convention does not speak of a right to asylum in any particular country. This is the contradiction at the heart of refugee law that certain states, wanting to delimit their responsibilities, have tried to exploit. Yet the Refugee Convention is not a document written for a system of refugee resettlement. It is based on territorial obligations. The Australian Immigration Minister has written to Human Rights Watch that the Convention was drafted to ensure states “retained the capacity to manage their responses to refugee crises in ways that can provide the best outcome for as many refugees as possible, and those in genuine need of protection.” Human Rights Watch believes, on the contrary, that the Convention was drafted to protect the rights of individual refugees, regardless of utilitarian calculations.

Furthermore, given that the vast majority of the world’s refugees will always remain within their regions, usually hosted by the world’s poorest countries, Human Rights Watch does not consider the present crisis in the international refugee regime to be caused by an increase in secondary movement.

In his statement to the 2002 UNHCR Executive Committee, the Australian Immigration Minister spoke of the “hard choices” facing states, posing a false dichotomy between the needs of those refugees waiting in camps and the supposedly lesser needs of those who manage to reach Australia of their own volition: “We cannot simply focus our energy, our resources, our compassion on people who are reaching the borders of western countries through secondary and tertiary movements; we must remember the needs of those who are further away,” he declared.⁵⁰⁹ While this is true, his belief that those further away can only be helped by means of rejecting those who come without an invitation is not.

It is to avert this dangerous logic that UNHCR is now searching for alternative ways to resolve the question of secondary movement, by means of “special agreements” that may supplement the Refugee Convention on a regional level.⁵¹⁰ While it is hoped that such agreements could lead to more equitable global burden-sharing (that is, transfer of resources to first countries of asylum) and increased multilateral commitments for resettlement, it remains to be seen what rights of refugees arriving in the developed

⁵⁰⁸ Universal Declaration of Human Rights, Article 14.

⁵⁰⁹ Statement by Minister for Immigration and Multicultural and Indigenous Affairs, Geneva, 30 September 2002.

⁵¹⁰ “...in the case of ‘secondary movement’, a special agreement could be drawn up to define the roles and responsibilities of countries of origin, transit, and potential destination, with regard to asylum seekers.” Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at the informal meeting of the European Union Justice and Home Affairs Council, September 13, 2002.

world may be traded in exchange for these clear benefits. UNHCR is considering offering its services to screen asylum seekers in order to determine who has and has not abandoned prior effective protection in another country of asylum, with a view to returning and readmitting those who are screened out. Proposals along these lines are expected to be made to governments at the next meeting in the Bali Ministerial Process,⁵¹¹ to be held in April 2003.

Australia played a leading part in the establishment of today's international human rights framework: it was chair of the committee when the Universal Declaration of Human Rights was adopted, it was crucial to the development of the Convention on the Rights of the Child, and in 1950-51 Australia was actively involved in designing the Refugee Convention.⁵¹² By contrast, in 2001, the Australian government was threatening to withdraw from the UN treaty bodies⁵¹³ and was undermining by advocacy at international for a long-established norms of refugee protection that have saved countless lives over the past fifty years.

Retrenchment to minimal obligations

The government of Australia describes itself as offering "Convention plus" protection,⁵¹⁴ meaning more than it is obliged to provide under the Refugee Convention. It suggests that if Australia has historically exceeded its international legal commitments and is now, by democratic will, no longer inclined to do so, then all it is doing is withdrawing generosity and compassion, not denying rights. This is untrue. The Australian government fails to acknowledge that it is violating at least three rights embodied in the Refugee Convention by the terms of the Temporary Protection Visas, as well as blatantly violating the human right of asylum seekers and refugees not to be arbitrarily detained, whether in Australia or the Pacific. It is not, therefore, a question of Australia "going back to first principles"⁵¹⁵ so much as searching unashamedly for the lowest common denominator,⁵¹⁶ and in doing so, crossing the line and violating its international obligations.

A senior DIMIA representative stated before an Australian Senate Inquiry in April 2002: "The obligation of the Australian government is not to *refoule* anyone who enters our territories. That is the obligation; it is no more than that."⁵¹⁷ In fact, the obligations of the Refugee Convention run far deeper than *non-refoulement*. International protection should be seen as a surrogate for national protection and, as such, should offer a secure legal status, overcoming restrictions on rights over the course of time, and, if return of the refugee remains impossible, offering access to the solution of local integration.

Need for increased accountability of IOM and UNHCR

IOM and UNHCR cannot be held accountable to the rule of law in the same way as sovereign states. When governments contract with IOM and UNHCR, and violations occur, these agencies must be held accountable, but ultimately the government concerned must also be held responsible. Therefore it is

⁵¹¹ This process is the outcome of a regional conference on people-smuggling in the Asia-Pacific region, held in Bali in February 2002.

⁵¹² Australia was the 6th state to accede on January 22, 1954,

⁵¹³ See ABC News Online: www.abc.net.au/worldtoday/s168888.htm

⁵¹⁴ "Ruddock flags alternative plan," *The Canberra Times*, June 18, 2002.

⁵¹⁵ Human Rights Watch interview with DIMIA, May 2002

⁵¹⁶ A former teacher from Woomera Detention Centre testified that it felt like the Australian immigration authorities "just tried to imagine Third World conditions, and then said, 'Right, we don't have to go anywhere past that.'" *Business Review Weekly (Australia)*, July 11, 2002. Also see: Dr Dominic Meany, who worked as a health professional at Woomera, spoke of the deliberate provision of "Third World standards of medicine." "Detainees denied vaccines," *The (Melbourne) Age*, May 19, 2002.

⁵¹⁷ DIMIA testimony to Australian Senate Inquiry into a Certain Maritime Incident, 821, 16 April 2002. The Australian Immigration Minister, Philip Ruddock, made a similar statement to Human Rights Watch in Geneva on October 2002: "The only obligation under the Convention is non-refoulement."

incumbent upon these organizations, when taking on activities and responsibilities that are usually the preserve of states, to work with the maximum transparency and impartiality.

IOM, in particular, must make public its position with regard to undertaking projects that may not comply with international human rights or refugee law, and must, in practice, defer to the advice of UNHCR and other UN bodies when considering projects that may raise such questions. While it is true that IOM probably provides better care, particularly health care, to asylum seekers and others in detention in Nauru and Papua New Guinea than the Australian state authorities provide in Australian facilities, IOM should acknowledge that its role in the “Pacific Solution” has been instrumental to the violation of rights rather than humanitarian in nature.

Australia believes that IOM is now “at a crossroads” with a decision between “remaining essentially a service delivery agency and moving strongly into migration policy matters.” The Australian government is encouraging the organization to take a more “strategic role” on issues such as combating people-smuggling and deterring secondary movement.⁵¹⁸ UNHCR and IOM should ensure, through their Joint Action Group on Asylum and Migration, that the IOM’s work in these fields does not impinge on the right to seek asylum, including the ability of those without effective protection to move onward in search of it.

Australian legislation and policy has increasingly cited the presence of UNHCR as a measure of safety and/or access to effective protection in countries of first asylum and transit. IOM too needs the screening and protection-mandated authority of UNHCR as a precondition for its work with intercepted “irregular migrants” and voluntary returns. UNHCR therefore has to address the fact that its under-resourced refugee status determination procedures and resettlement system are being used as sufficient measures of effective protection and thereby as a means of weakening of refugees’ rights in western asylum countries.

Support for countries of first asylum and transit

The Australian government has recognized the vastly disproportionate costs borne by Iran, Pakistan and other countries facing mass influxes⁵¹⁹ and has even acknowledged the extent to which the international protection framework has failed to deliver durable solutions to refugees in those countries, resulting in “millions of people living in uncertainty and poverty in border regions.”⁵²⁰ Yet Australia’s humanitarian will evaporates when it comes to individuals wishing to escape this uncertainty and indeed the certainty of codified discrimination by coming to its shores without an invitation.

Australia’s policies blur a fundamental distinction between two root causes of forced displacement: causes of primary displacement and causes of secondary displacement. Secondary displacement results from failures of refugee protection in many cases and therefore calls for capacity-building strategies for enhanced protection, as distinct from general development or human rights policies. Enhancing protection in regions of origin is a much more effective and ethical means of combating people-smuggling than building additional barriers to the movement of asylum seekers.⁵²¹

⁵¹⁸ Australia’s Statement to the IOM Council Meeting, 2001.

⁵¹⁹ “[T]here has been outstanding generosity on the part of host countries in the region, particularly Iran and Pakistan. Millions of *prima facie* refugees have benefited from asylum for long periods.” Australian Statement to 52nd Session of the UNHCR Executive Committee, October 2001.

⁵²⁰ Australian Statement to 52nd Session of the UNHCR Executive Committee, October 2001.

⁵²¹ In the late 1990s, reception in regions of origin became the subject of numerous intergovernmental [see e.g. the Intergovernmental Consultations “Working Paper on Reception in the Region of Origin,” Geneva, September 1994, and follow-up papers in 1995 and 1998] and independent [see e.g., James Hathaway ed., *Reconceiving International Refugee Law* (Kluwer Law Int’l, 1997); J. Hathaway & A. Neve, “Making International Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection,” 10 HARVARD HUM. RTS. J. 115 (1997)] research

Australian policy to date has been to the contrary. Beyond its core annual contribution to UNHCR (Australia is its eleventh largest donor), Australia pledged an additional A\$11.35 million in aid to UNHCR and countries of first asylum in 1999-2000, over A\$30 million in 2000-01, and A\$54 million in 2001-2.⁵²² Yet the A\$21.5 million which Australia contributed to support countries bordering Afghanistan in 2000-01, or even the A\$37.43 donated for this purpose in 2001-02, is dwarfed by the A\$2.87 billion cost of maintaining the “Pacific Solution” over the next four to five years.⁵²³

Australia is strengthening the Indonesian authorities’ ability to spot false documents and prevent embarkation⁵²⁴ and training them on Australian visa and entry systems. DIMIA admitted to Human Rights Watch in May 2002 that there was *no* refugee protection training provided to Indonesian officials — not even an explanation on the duty of *non-refoulement* regardless of validity of travel documents. Australia has twenty-six overseas postings active in gathering information on “irregular movements” and nine airport liaison officers (ALOs)⁵²⁵ who act in an advisory capacity in foreign airports to help intercept asylum seekers heading to Australia. Since a DIMIA “risk profile” weeds out anyone likely to apply for asylum after they enter legally on a tourist or student visa, entry of refugees by air is becoming nearly impossible.⁵²⁶ This fact makes Australia’s closure of its coastal borders all the more irresponsible.

Australia has stated⁵²⁷ that part of a “comprehensive and integrated approach” must be “supporting and encouraging countries of first asylum to continue to provide effective protection.” It appears, however, that Australia’s current deterrent policy of non-admission resulted from the government’s losing patience with the root causes approach. Human Rights Watch believes that a truly “comprehensive approach” by the Australian government should include:

- Greater support not just for UNHCR’s assistance work but also for its advocacy work wherever refugees are kept in an artificial state of prolonged temporary asylum or denied legal status and thereby denied their rights under the Refugee Convention;
- Treating countries such as Iran, Pakistan and Indonesia not just as “staging points” for people-smugglers, but as partners in achieving better global protection, and in this spirit refraining from

projects. These projects were based on DIMIA’s favorite statistic – the US\$10 billion spent on the asylum systems of industrialized states in comparison to the US\$1 billion budget of UNHCR – and the moral argument that more and “needier” refugees could be helped if the resources currently spent on processing claims in the west could be redistributed overseas. Such arguments can be used in two alternative ways, however: they can be a principled response to the fact that migration controls of western states have become externalized during the past decade, and to the fact that territorial asylum has never been an equitably distributed resource, or, alternatively, they can be used to justify measures of containment and deterrent policies.

⁵²² Table of Funds Pledged and Paid to International Organizations for Humanitarian Assistance for financial years 1999-2002, sent from DIMIA to Human Rights Watch.

⁵²³ For a summary of the financial costs of the “Pacific Solution” *see* CMI Report, Chapter 11.

⁵²⁴ This includes five speedboats worth over A\$1.5 million and A\$18.4 million over 2002-3 to combat people-smuggling (and then A\$75 million over the following four years). DIMIA told Human Rights Watch that they were unconcerned about whether the trained officials extorted money from those they identify as holding false documents. Nearly every person interviewed for this report had had to pay a bribe, of between US\$100-500, in order to pass through immigration at Jakarta or the checks in Medan and Batam. One unaccompanied Iraqi boy had been “arrested” and put in a police room at Jakarta airport, where he was threatened with deportation for six hours before agreeing to pay US\$200 to be released. Human Rights Watch interview No.39, Melbourne, Australia, April 3, 2002. One Afghan refugee who flew from Karachi to Jakarta witnessed that his smuggler paid the immigration officials, whereas other refugees who did not pay enough were turned around and immediately deported, despite the fact that he heard them beg to see UNHCR. Human Rights Watch interview, No. 40, Melbourne, Australia, April 3, 2002.

⁵²⁵ All of these are accredited diplomatic officers attached to the Consulates.

⁵²⁶ Human Rights Watch interview with DIMIA Border Protection, May 2002.

⁵²⁷ DIMIA, “Principled Observance of Protection Obligations and Purposeful Action to Fight People Smuggling and Organized Crime: Australia’s Commitment,” 2001.

intercepting or returning refugees to countries with lesser capacity to process and host refugees, or where UNHCR provides the only protection;

- Enhanced support for local nongovernmental organizations, including legal aid and human rights groups in countries of first asylum, particularly those who might provide legal advice to asylum seekers having their claims determined by either national authorities or by UNHCR in Iran, Pakistan, Turkey, Syria and Jordan.
- Meaningful consultation with such groups as to how the protection situation of refugees in such countries can best be improved within their domestic contexts;
- Support for UNHCR's partnerships with local nongovernmental organizations to set up safe houses or other local programs to ensure urgent protection needs are more fully met in countries of first asylum;
- Supplement support currently provided to Southeast Asian transit countries to combat people-smuggling with assistance aimed at tackling the causes of internal displacement, training immigration officials and other authorities on refugee and migrant rights, and supporting civil society, including the work of local human rights groups;
- Increasing resettlement quotas⁵²⁸ and reducing migration-oriented selection criteria for such quotas, which prevent the most vulnerable from qualifying. An expansion of the resettlement system, however, should serve only as a complement to, rather than substitute for, providing territorial asylum to those who arrive in Australia spontaneously.

The highest price that the Australian government has paid for its current policy is the loss of moral authority to call for more effective protection worldwide. Conversely, the best assistance that Australia could now provide to the global refugee protection regime would be once again to set a positive example by moving away from its hard-line position on secondary movement and reopening its coastal borders to those exercising their human right to seek asylum.

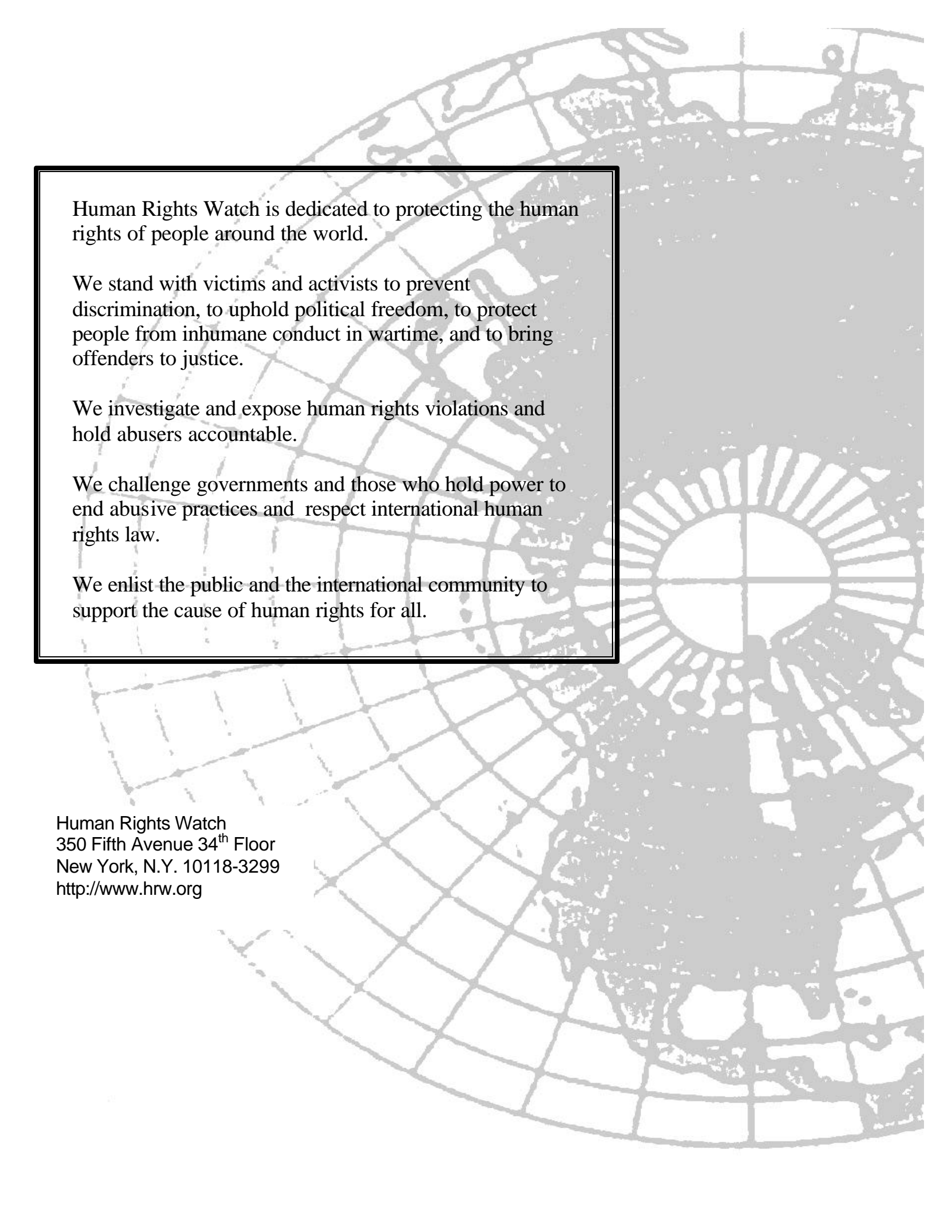
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⁵²⁸ As stated in the summary to this report, Australia ranked third in the world, after the United States and Canada, in the number of refugees it resettled in 2001. Nevertheless there remain insufficient resettlement places available to meet resettlement needs worldwide, and countries such as Australia need to display greater leadership toward resolving this crisis. Such a valuable contribution to global responsibility sharing, however, in no way excuses the summary closure of Australia's coastal borders to a group comprising many persons urgently in need of protection.

course of our research. Above all, we would like to thank the fifty refugees and asylum seekers who shared their stories with us for this report.



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